No. 45476-9-II

DIVISION II COURT OF APPEALS
OF THE STATE OF WASHINGTON

TED SPICE AND PLEXUS DEVELOPMENT, LLC,

Appellants,

v.

PIERCE COUNTY, a political subdivision, and
CITY OF PUYALLUP, a municipal corporation

Respondents.

AMENDED OPENING BRIEF OF APPELLANTS/PETITIONERS TED SPICE AND PLEXUS DEVELOPMENT, LLC

CAROLYN A. LAKE
WSBA #13980
GOODSTEIN LAW GROUP PLLC
Attorney for Appellants
501 South G Street
Tacoma, Washington 98405
(253)229-6727

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

I. INTRODUCTION

What began as a water service case, where three owners of land merely and appropriately sought water service from the City of Puyallup, ("Puyallup"), has turned into a quagmire of complex litigation where Puyallup has unleashed its boundless resources against the denied water customers, at one point seeking over $300,000 in fees and costs to be imposed. In 2004, Puyallup failed to act on Petitioners[1]' water service request, in precisely the same manner as Puyallup acted in *Stanzel v. Puyallup, Stanzel v. City of Puyallup* 150 Wash. App. 835, 209 P.3d 534, Wash. App. Div. 2, 2009. Copy attached. When the Petitioner property owners would not go away, Puyallup used its unlimited resources and repeated legal maneuvers to try and stop the substantive issues of this case from being heard. Despite clear precedential rulings that benefited Petitioners before the Pierce County Hearing Examiner ("HE"), Puyallup contested it had any duty to provide water service to Petitioners later at the Superior Court. The Superior Court also issued a series of bad rulings that also overlooked the significance of the HE's Findings of Fact and Conclusions of Law which Puyallup had not appealed and were verities. The ill-advised Court rulings spanned a series of years and included the Court's failure to rule as a matter of law that Puyallup breached its duty to

[1] Petitioners to this appeal are Ted Spice and Plexus Development LLC.

provide water service, and later that Petitioners "waited too long to act" on remand, and that because the LUPA case was "final" and in Puyallup's argument, "un-appealable", then Petitioners' RCW 64.40 and tort damages action also should be dismissed. The Trial Court also imposed over $130,000 in fees and cost against the Petitioner property owners. Petitioners stood their ground, and appealed. Puyallup only intensified its opposition.

After one of the three petitioners died, Puyallup first argued that all the claims of all Petitioners must also be dismissed, claiming the deceased Petitioner was an indispensable party per CR 19. This is despite the fact that three distinct Petitioners originally pursued this LUPA action, which included a claim for damages pursuant to tort and RCW 64.40. The LUPA Petition identifies all Petitioners as property owners. Petitioners all had property interests, which evolved throughout the years, in a Property Parcel 7705000191, ("Subject Property"), for which they sought a change in Puyallup water service from residential use to commercial development. While the administrative and LUPA appeals were being pursued, Ms. Mathews and Mr Spice exercised their investment actions using various entities, including an LLC for managing the Subject property and at times conveyed portions of the property interests. This intertwined ownership interests bound the three Petitioners together in the LUPA and damages

actions. Ms. Mathews' passing then triggered complex probate litigation involving Ms. Mathew's daughter Donna DuBois that further complicated the ownership interests. But all times, Spice and/or Plexus maintained an interest in the Subject Property. Petitioners opposed and presented both facts and statutory and case law that supported remaining Petitioners' position that any owner of "an interest or right in property" could seek damages. Thus, despite Ms. Mathews passing, the case remained viable for the remaining two Petitioners, based on their demonstrated and uncontested interest in the Subject Property.

The Trial Court wrongly sided with Puyallup and dismissed all causes of action as to all Petitioners, and also, upon Puyallup's request, vacated all Orders and Judgements including the attorney fee award. But Puyallup did not stop there.

Puyallup argued for CR 11 fees and sanctions against remaining Petitioners and their legal counsel for an alleged violation that didn't occur: alleging that legal counsel continued to represent the deceased Petitioner after she passed. Petitioners agree that the law provides that if a client passes, the authority for an attorney to act for ***that client*** ceases. But that is not full story of the case here. Additional Petitioners remained. No cases cited by Puyallup stand for the proposition that when one of three Petitioners die, the authority also ceases for Counsel to continue to

advocate for the claims of the remaining two Petitioners. Puyallup's attorneys admitted to the Court that they **could find no law in support of its theory**:

> **There just isn't a case we could find anywhere after lengthy research to say, gee, this is a Rule 11 violation** when your client dies and three and four years later you continue to litigate on behalf of the client, have hearings, file briefs, file motions, file declarations with her name on the caption, allow orders to be entered, and have a judgment entered against a dead person, and then disclaim any responsibility for any of that. I mean, it's such a bizarre set of facts here that the courts I guess haven't had to deal with that before.

CP 5259- 5260. Puyallup sought **over $300,000.00** in CR 11 sanctions. In response, Petitioners' Legal Counsel maintained that every pleading filed since the passing of the one petitioner was done to protect the interest of the remaining two. All actions taken were grounded in the facts and law that **each** Petitioner had an interest in the property that supported the damages claim. None the less, the Court imposed a whopping $45,000.00 in CR 11 sanctions against one of Petitioners' legal counsel. The amount imposed against Counsel is all the more disproportionate since the Trial Court was aware that that Legal Counsel had received no compensation since 2008 - for the last eight years of this complex litigation:

> MS LAKE: We make mention in our brief that **since 2008, this counsel, anyway, has received absolutely no fees from plaintiffs.** And I say that not to -- for no other purpose than to say we're not churning up stuff here for the fun of it. Your Honor may remember a district court case where a property owner was prosecuted criminally, and I took that case. And, again, that was one where there wasn't any fee. I don't take easy cases, but I take cases that have a good faith basis

> and which are justified in the law, and this case demanded justice then, it demands justice now.

TR 9/25/15 @ 48:4-8. CP 5295. Once the Court announced its CR 11 ruling at a lower amount that Puyallup sought, Puyallup promptly reversed its previous stance, and then sought to "amend"/"reinstate" the original attorney fee award as to the remaining two Petitioners[2]. This is judicial estoppel in spades, and the Court erred by granting this schizophrenic legal inconsistency.

This appeal should be granted to provide remaining Petitioners the just result of the water service they were denied as far back as 2004 and the damages they were denied in 2008. Further, the CR 11 sanctions must be reversed, on numerous theories, but primarily for the chilling precedent it sets. The intent of Rule 11 is not to chill an attorney's enthusiasm or creativity in pursuing actual or legal theories because, if excessive use of sanctions chilled vigorous advocacy, wrongs would be uncompensated; specifically, attorneys, because of fear of sanctions, might turn down cases on behalf of uncharismatic individuals seeking redress in the courts. *Saldivar v. Momah,* 145 Wash.App. 365, 186 P.3d 1117 (2008), *as amended, review denied* 165 Wash.2d 1049, 208 P.3d 555.

CR 11 says that you need to think carefully about imposing CR 11 for

[2] The Court announced its CR 11 ruling and amount on December 11, 2015. CP 5308-5343. See December 11, 2015 Transcript. Puyallup thereafter filed its (first) motion to "reinstate" the Judgement in January 2016.CP 5063-5075.

> the chilling effect it has. **You know, there is a saying that you can't fight City Hall. And here where private citizens who are seeking no more than to get water service from a city who denied them being able to get it, can't come and seek relief for fear that the case is going to be turned against them and have this huge amount of sanctions imposed upon them, then City Hall will always win.** This is the very chilling effect that your Honor needs to take into effect.

CP 5302. Transcript of September 25, 2015 hearing, at 54:5-16.

This Court should (1) grant the appeal, (2) revise and strengthen the 2008 Court Order to find as a matter of law Puyallup breached its duties to provide water service to Petitioners, (3) reverse the Court's 2013 Order dismissing RCW 64.40, Declaratory Judgment and tort claims, (4) remand for trial on damages and attorney fees owed to Petitioners, (5) reverse the CR 11 Order for Sanctions, and (6) reverse the April and May 2016 Orders awarding fees and costs and (7) vacate the 2016 Judgements.

II. ASSIGNMENTS OF ERROR & ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. **The Pierce County Hearing Examiner Erred in August 7, 2007 Decisions in Finding the HE lacked authority to require Puyallup to provide water service to Petitioners.** (Conclusion of Law #3 and that part of the Decision which found that the HE lacked authority to require Puyallup to provide water service to Petitioners)

1. The HE Decision is contrary to the evidence, fails to properly consider and/or interpret the law and is a clearly erroneous application of the law to the facts. In addition, by not firmly requiring Puyallup to affirmatively meet its duty to provide water service to Petitioner, the Decision deprives Petitioners of their constitutionally protected rights, including Petitioners' due process rights.

2. In particular, Petitioners appeal the following from the August 7, 2007 Decision:

- Conclusion of Law No(s). 3.

- That portion of the Decision which determines that the HE lacks authority to compel Puyallup to provide water service to Petitioners.

3. The HE Errored by not requiring Puyallup to provide water service where Puyallup breached its duty to do so.

3.1. Puyallup breached its duty to provide water service to Plexus pursuant to Puyallup's Service Area Agreement, the CWSP, and Chapter 70.116 RCW upon which these agreements are founded, and an independent duty pursuant to RCW 43.260.

3.2. Puyallup breached its duties as exclusive water service provider pursuant to RCW 70.116, the Pierce County Water System Plan, Puyallup's Standard Service Area Agreement, RCW 43.20, and Puyallup's DOH approved water system plan.

3.3 Puyallup has breached a duty recognized by Washington Courts. The Courts recognize a duty to provide service where a city "holds itself out" (1) as willing to supply sewer or water service to an area, or (2) where a city is the exclusive supplier of sewer or water service in a region extending beyond the borders of the city. See: *Mt Development LLC, et al., vs. City Of Renton, et al*, Court of Appeals Division I, 59002-2-I, (Aug. 27, 2007); *Yakima County Fire Protection District No. 12 v. Yakima*, 122 Wn, 2d 371, 858 P.2d 245 (1993) at 381-2, *citing Barbaccia v. County of Santa Clara*, 451 F.Supp. 260, 264 n. 2 (N.D.Cal.1978). See also *Milwaukee v. Public Ser. Comm'n*, 268 Wis. 116, 120, 66 N.W.2d 716 (1954) (explaining that "[t]the basic question here is whether appellant has extended its service and is holding itself out to serve in the general area")

4. The Land Use Decision is an erroneous interpretation of the law, and or of the facts.

5. The HE's Land Use Decision is a clearly erroneous application of the law to the facts.

6. Puyallup's failure to act on Petitioners' water service request violates the constitutional rights of the Petitioners.

7. The HE's decision allows Puyallup to erroneously extinguish/interfere with Petitioners' constitutional property right without compensation and in violation of the Petitioners' constitutional rights, and violates Petitioner's procedural and substantive due process rights.

B. The Superior Court Erred by Entry of Order dated September 12, 2008. (Finding of Fact/ Conclusions of Law Nos. 1-3, and 5).

1. Did the Superior Court Err by Not Remanding the LUPA appeal back to the Pierce County Hearing Examiner with explicit finding that the HE had authority to require Puyallup to provide water service to Petitioners and with Order to do so? YES
2. Did the Superior Court Err by ruling the Declaratory Judgement matter was moot? YES

C. The Superior Court Erred By Entry of Order dated June 13, 2013. ("Conclusions": 1-5 and all unnumbered hand written additions to Order)

1. Did the Superior Court Err by ruling the HE Decision of August 7, 2007 is final, binding and barred from judicial or other review? YES
2. Did the Superior Court Err by ruling Petitioners' LUPA claims is final binding and further trial court review of claims arising from the LUPA Petition are barred and dismissed with prejudice? YES
3. Did the Superior Court Err by ruling all claims and actions are barred and dismissed with prejudice including Petitioners' Declaratory Judgement and tort claims which were not raised in the SJ Motion and were not briefed by Movant? YES

D. The Superior Court Erred by denying Petitioners' Motion for Reconsideration. (Order on Reconsideration)

E. The Superior Court Erred by Order and Judgement dated December 13, 2013 in Awarding Attorney Fees (Finding of Fact Nos. 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and Conclusions of Law 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 and Order)

1. Did the Superior Court Err by ruling Puyallup was the prevailing party and entitled to fees and costs per RCW 64.40.020(2), but then failing to segregate those fees and cost which relate to the RCW 64.40 claims? YES

F. The Superior Court Erred by Order dated July 20, 2015. ("findings & conclusions" Nos. 2, 5, 14, 16, 17,18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and Orders)

1. Did the Superior Court Err in finding one of the three Petitioners to be an indispensable party, with the result that upon one Petitioner's death, the Court found that the claims of the remaining two Petitioners were extinguished? YES

2.Did the Superior Court Err by Vacating Prior Orders and Judgment? YES

G. The Superior Court Erred by Order on CR 11 dated April 15, 2016. (Findings of Fact Nos. 1, 3, 4, 7, 9, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 26, 28, 32, 36, 3839, 40, 41, 42, 43, 44, , & Conclusions of Law Nos.3, 4, 5, 6, 7, and Order)

1. Did the Superior Court Err in finding CR 11 violation against Petitioners' legal counsel? YES
2. Did the Superior Court Err in imposing $45,000 as CR 11 sanction against Petitioners' counsel? YES

H. The Superior Court Erred by Order dated April 15, 2016 "Clarifying and Amending" Previous Order Vacating Attorney fees by Re-instating Attorney Fees. (Findings of Fact Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, & Conclusions of Law Nos. 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, and Orders, & Appendix I : I(b), II)

I. The Superior Court Erred by Order dated May 20, 2016

J. The Superior Court Erred by entry of Judgments dated May 20, 2016.

III. STATEMENT OF THE CASE

Petitioners. Three distinct Petitioners filed this LUPA action, which included a claim for damages pursuant to RCW 64.40. CP 1-28. Petitioners all had property interests, which evolved throughout the years, in a Property Parcel 7705000191, ("Subject Property"), for which they sought a change in Puyallup water service from residential use to commercial development. CP 1-4, and 4758-4761. When Puyallup failed to act on and refused to process Petitioners' water application, Petitioners first applied to the Pierce County Hearing Examiner, the office ***precisely*** designated by the Water Plan to arbitrate and remedy disputes between

purveyors and customers. See Pierce County Code (PCC) Ch. 19D. 140, and then sought relief through LUPA (Land Use Petition Act) and for RCW 64.40 and tort damages. The LUPA Petition identifies all Petitioners as property owners.[3] Petitioners maintain the damages accrued from the date of the application (2004), were on-going and were substantial. CP 991-1002, 4762-4773.

Respondent Puyallup as Regional Water Provider. At times relevant herein, Puyallup signed, was a participant to and has received the benefits of a state-mandated and County administered "Pierce County Coordinated Water System Plan." ("CWSP" or "Water Plan"). CP 108, 122. That Water Plan and associated Agreements carve out water service areas within the County and grants to each of the various water service providers, including Puyallup, an exclusive service delivery area for each provider. CP 97, 100, 119, Thus, where water purveyors formerly competed amongst one another, per State law,[4] each are now granted a monopoly over geographic portions of the County. In exchange for this fixed, monopolistic water service area, the purveyor agrees to provide

[3] Ms. Mathews status as fee owner was described to satisfy RCW 70C. 040(c) which calls for service upon each person identified by name and address as the taxpayer for the property at issue in the records of the county assessor based on the description of the property in the application, if no person is expressly identified un the underlying written decision as the land owner. Being named as the fee owner in the tax assessor rolls does not negate the other demonstrated property interests help by Spice and Plexus.

[4] The Public Water System Coordination Act (RCW 70.116) provides the legal mechanism to establish exclusive water utility service areas within areas designated as "critical water supply service areas". CP 119.

reasonable service to **all** retail customers within the defined service area,[5] both within and without of city boundaries. CP 120, 651. The state law envisioned that this regional water service plan would more efficiently and fairly allocate a scarce, critical infrastructure resource. CP 122.

Puyallup Bound by Plan. Puyallup signed the Water Plan nearly three decades ago, CP 122 and has reaped the benefits thereafter. However, Puyallup failed to abide by **its** end of the bargain. With respect to Petitioners and others, Puyallup failed to uphold its duty to provide reasonable water service, per the Water Plan and Agreement. CP 100 (HE F/F #3). Instead, with respective to Petitioners, Puyallup attempted to exploit its monopoly of water service by insisting that all proposed **County** customers must actively annex to the **city** as a condition of receiving Puyallup's water. CP1108. This improper city-mandate extended even to existing Puyallup water customers, like Petitioners, who merely seek to change the water usage from residential to commercial.

Puyallup refuses Petitioners water service. After nearly a year of jumping through Puyallup's hoops to obtain water service, Petitioners were turned down flatly by Puyallup. CR 124, 129, 1108. On August 3, 2004, Plexus attended Puyallup's pre-application meeting, required by

[5] Pursuant to the "Municipal Water Law" (43.20 RCW), Puyallup is required to provide water service to **all** new retail customers within its retail services areas. "A Municipal water supplier, as defined in RCW 90.03.015, has a duty to provide retail water service within its retail water service area". CP 120.

Puyallup code to be the first step in obtaining water service for areas outside City limits. CP 120, 281. Puyallup staff issued Plexus its list of conditions which Puyallup would require prior to allowing water service to Plexus. CP 627-8. However, Puyallup also advised Plexus that it would not act on Petitioners' application/allow Plexus access to water service unless or until annexation of the Plexus property was entirely under way. CP 120, 122, 627-628, 1108. Per City official Colleen Harris, the City determined that, "...the City of Puyallup cannot issue you a water availability letter until your property is in the process of being annexed. At this time, we have not received enough signatures from properties within your area to proceed ahead with annexations. Therefore, the City is unable to issue you a water availability letter at this time." CP 1108. Puyallup failed to timely act (or act at all) in 2004 on Petitioners' water application and throughout most of the appeal timeframe continued to fail to act on the Petitioners' request for water service altogether because the Subject Property was not currently in the process of being annexed.

Pierce County Serves as Water Dispute Resolution Forum. Petitioners sought out the proper remedy dictated by the Water Plan, to which Puyallup is bound.[6]CP122,619-20. Petitioners applied to the Pierce

[6] At times relevant to the LUPA appeal, The Regional Water Plan is implemented by provisions of Pierce County Code Ch. 19D. 140, which provisions include a dispute resolution process at §19D.140.090. CP 97 and 619-20.

County Hearing Examiner, the office ***precisely*** designated by the Water Plan to arbitrate and remedy disputes between purveyors and customers. See Pierce County Code (PCC) Ch. 19D. 140. CP 122-3.

Puyallup Ignores Petitioner/County's Water Dispute Resolution Process. Continuing its role as the arrogant bully on the playground that holds all the marbles, Puyallup deemed it beneath them to attend or participate in the County's dispute resolution process. CP 102, 123.

2005 PC Hearing Examiner Ruling. Following a hearing, the Pierce County (PC) Deputy Hearing Examiner (HE) issued his Decision, releasing Petitioners from their obligation to be tied to Puyallup as a water service purveyor, and instead allow Petitioners the alternative to seek water service from providers other than Puyallup. CP 124.

2006 HE Reconsideration. On reconsideration, the HE also granted Petitioners the ***conditional opportunity*** to return to the HE to seek an Order requiring Puyallup to provide water service, if other water service could not be found:

> 7. If either the Group A well water system or any other water source is not feasible for the applicant, **then the Petitioners can request from the Hearing Examiner that the City of Puyallup be required to provide water to the site.**

CP 131. January 12, 2006 Decision on Reconsideration.

Although the HE provided nearly all the remedies sought by Petitioners, Petitioners filed a LUPA appeal in order that the Court may provide the

full measure of relief to Petitioners, i.e., to ***unconditionally*** require that Puyallup abide by its duty to provide water service to these Petitioners and other property owners similarly situated. After the initial appeal was filed, Petitioners concentrated time and attention to pursuing the non-judicial resolution of the water service issue, seeking dialogue and probing possible global dispute resolution processes. CP 988-90. This was pursued as an alternative to and in lieu of the judicial appeal pathway. Petitioners also worked to exhaust the Examiners' two conditions. CP 98-9.

Petitioners' Withdrawal of First LUPA Appeal. On 17 November 2006, Petitioners withdrew their (first) Petition for LUPA appeal. CP 494-569 @ 523.

2007 PC HE Hearing for Further Relief. When no other mechanism for water service was found to be available, Petitioners renewed the Water Service Dispute process before the PC HE. Petitioners sought the relief ***specifically*** referred to in the HE's Recon Decision. CP 128-131. Petitioners presented evidence which established that: (1) A Group A well is not possible and or feasible for Applicant's site due to well radius and other site issues, and (2) no other water source is feasible. CP 99, 111-12, 141-161.

2007 HE Ruling. In the HE's resulting Decision of 7 August 2007, the HE found that Petitioners in fact had satisfied both conditions precedent

for the relief of requiring the city of Puyallup to provide continued water service to Petitioners. CP101-2. However, the HE found he lacked authority to require Puyallup to provide water service, but reserved action, pending the outcome of a Superior Court appeal:

> If a court determines that the Hearing Examiner does have authority to order this type of relief, then in this particular case, the Hearing Examiner would order the City of Puyallup to provide the service given these specific facts.

CP 102, (HE Con. Of Law # 3).

Petitioners' 2007 LUPA. Petitioners filed their 2007 LUPA appeal to affirmatively answer the question posed i.e. that the HE did have authority to provide effective relief in order to carry out the intent of the state law-mandated Water Plan, and to avoid allowing any one individual water purveyor to refuse service as allocated within the Plan. This authority was both explicit and implicit, and moreover, **required** in order to enforce Puyallup's duty to reasonably serve **all** retail customer within its exclusive service area as required by the Public Water System Coordination Act of 1977, Ch. 70.116 RCW (herein "Water Coordination Act"), the Regional Plan and the implementing provisions of the PC Code. CP 1-28.

Petitioners' 2007 Summary Judgement and Briefing. In 2007, Petitioners moved for Summary Judgment on matters of law that Puyallup breached its duty to provide water service. CP 341-366. The Trial Court

erred in not granting that SJ Motion. Petitioners renewed their request in their 2007 Opening LUPA Brief for relief that the Court rule as a matter of law and find Puyallup breached its water service duty. CP 367-435, CP 382. The Court erred in not granting the requested relief.

2008 Superior Court Order. In 2008, the Superior Court remanded the LUPA matter to the PC HE with instructions that the HE was empowered to consider whether Puyallup's requirement that Plaintiff annex to Puyallup was a reasonable condition precedent to Petitioners receiving water. CP 666-669. This was a partial victory for Petitioners, since if the condition was found unreasonable, then under the rules in place at that time, the HE could then strike the requirement, and Petitioners would receive the water service. However, the Court erred in not ruling as a matter of law that Puyallup breached its water service duty. The Court also bifurcated the RCW 64.40 damages action and ordered that those claims be set for trial. *Id.*

Related Stanzel Case. A fellow property owner had a very similar lawsuit against Puyallup, which was procedurally ahead of Petitioners' case. (Stanzel). To conserve dollars and for efficiency, Petitioners chose to pause their case to await the outcome of the *Stanzel* matter and appeal. CP

988-990 and 5298-9.[7] The Court of Appeals ruled in favor of Stanzel.[8] Puyallup ultimately settled with Stanzel providing water and attorney fees. CP 988-990.

The Evolving Property Interests of Ms. Mathews, Mr Spice & Their Various Investment Entities. While the administrative and LUPA appeals were being pursued, Ms. Mathews and Mr Spice exercised their investment actions using various entities.

- On September 5, 2003, the Washington State Secretary of State issued a certificate of formation to Mathews Investments, LLC. CP 4844.
- On October 18, 2003, Ms. Mathews executed an Authorization Letter that granted Ted Spice authority to act as owner's agent for property owned by Mathews Investments, LLC. CP 4845.
- On January 8, 2004, Ms. Mathews executed a promissory note secured

---

[7] "You've seen firsthand the scorched earth approach that this counsel takes when citizens are trying to get redress from the City. And knowing that my client had very limited resources, we knew that this exact case fact pattern in the *Stanzel* case was going up on appeal. In fact, it went up twice on appeal. It was a strategic decision, and if you read their case you'll see how intertwined *Stanzel* and Spice are. It was a strategic and efficient decision to say let them move the path forward and then we will follow that path so the City with their unlimited resources isn't burning up my client's money. So that was a strategic decision." TR September 15, 2015 hearing. CP 5298-99

[8] In the published Opinion *Stanzel v. Puyallup, Stanzel v. Puyallup, Stanzel v. City of Puyallup* 150 Wash. App. 835, 209 P.3d 534, Wash. App. Div. 2, 2009 CP 4783-4793, this Court of Appeals describes the intertwined relationship of the Stanzel case to the Plexus case:

> Stanzel brought a motion before the Pierce County hearing examiner as a part of a separate case involving one of Stanzel's neighboring properties, a company named **Plexus Investments, LLC,** seeking an order that would compel the City to provide him with commercial water service and an availability letter. Over the City's jurisdictional objections, the hearing examiner heard Stanzel's case while acknowledging that Stanzel did not go through the City's normal dispute resolution process. **The hearing examiner based the decision to hear Stanzel's motion on the hearing examiner's decision in the Plexus hearing,** where the hearing examiner ruled that the Pierce County Code allowed property owners outside of the city limits to go directly to the hearing examiner to resolve disputes.

Id The facts of Puyallup's treatment of Stanzel as described in that published opinion is identical to Puyallup's treatment of Petitioners.

by 11003 58th Street Court East, Puyallup, the subject property of this appeal, entitling Mr. Spice to half of all the equity from business projects related to the subject property of this lawsuit. CP 4846-7.

- On February 28, 2004, Doris Mathews appointed Appellant Ted Spice as her attorney in fact by duly executing a Durable Power of Attorney (DPOA). CP 4848-4853. The DPOA is very broad. The DPOA allows Spice to "exercise or perform any act, power, duty, right or obligation whatsoever that I [Doris Mathews] now have or may hereafter acquire[]", and also "to...sue for...tangible property and property rights..." *Id.* The DPOA also included that "I grant my agent [Ted Spice] full power and authority to do everything necessary in exercising any of the powers granted here as fully as I might or could do if personally present." *Id.*
- On April 22, 2004, Doris Mathews and Ted Spice executed the Plexus Investments[9], LLC Operating Agreement. CP 4854-4877. The Plexus Operating Agreement Paragraph 1.9 states that title to property owned by LLC and its Member is through interest in the LLC. *Id.* The Plexus Operating Agreement Paragraph 2.1 further states that, "Members shall have authority to act on behalf of company." *Id.* The Plexus Operating Agreement Paragraph 2.4 identifies Ted Spice as the Managing Member of Plexus Investments, LLC, and grants enhanced authority of the managing member, including the authority to "oversee any current projects or going concerns". Id. The Plexus Operating Agreement Paragraph 2.5 establishes responsibilities of non-managing members such as Ms. Mathews: "None". *Id.* Plexus Investments, LLC has remained an active entity at all times since March 24, 2004. *Dec'l Spice* ¶ 7. The Plexus Operating Agreement Statement of Interests and Holdings attachment includes a notarized statement that "all property and assets listed compromise the entire holdings of Plexus Investments, LLC, and goes on to expressly list and legally describe the subject property of this lawsuit, 11003 58th Street Court East, Puyallup. CP 4854-4877.

---

[9] Most if not all pleadings in this case since its inception identify "Plexus Development" as the Petitioner/Appellant. The detailed look at corporate filings spurred by the City's instant Motion reveals Ms. Mathews' and Mr. Spice's LLC is named "Plexus Investments." This is a de minimus distinction; this Court has expressly held that: "A formalistic error in the land use petition's caption should not serve as the sole basis to deny review of land use actions under RCW 36.70C.040." *Quality Rock Products, Inc. v. Thurston Cnty.*, 126 Wn.App. 250, 271, 108 P.3d 805 (Div. 2, 2005). Also, CR 10(a)(1) provides that after the first pleading "it is sufficient to state the name of the first party on each side with an appropriate indication of other parties." Ted Spice has been the first party for purposes of CR 10(a)(1).

- Mr Spice held a 33% interest holder in the subject property, by Quit Claim Deed dated December 1, 2007 and recorded June 3, 2009. By that Deed, Ms. Mathews deeded a one-third interest to Ted Spice in the property which is subject to this LUPA and damages claim. CP 4879.
- By Quit Claim Deed dated June 9, 2009 and recorded December 21. 2009, Ms. Mathews deeded the remaining two thirds interest to Ted Spice in the property which is subject to this LUPA and damages claim. CP 4880.

Actions Post-Death of Ms. Mathews. On December 8, 2009, Doris Mathews died. CP 2642. Initially, Ms. Mathews' daughter Donna Dubois became personal representative of the Mathews' Estate but she was later removed as Personal representative by Court Order March 2, 2015. CP 2658-62. CP 4885-4887. On August 2, 2010, Mr. Spice was required to file a claim against Ms. Mathews' estate, to protect his interests, Pierce County Cause No. 10-2-11622-8 (hereafter: "Probate Case" CP4774-4779), and other litigation with the Mathews estate and personal representative Ms. Dubois. Ms. DuBois was aware of the LUPA appeal, through her mother prior to passing.[10] At no time throughout any of the proceedings, post-passing of Ms. Mathews, did the Mathews' Estate attempt to substitute as party to this litigation or to move to dismiss as a party. CP 2659. The Probate Case ultimately resulted in a decree that apportioned numerous real property titles as between Mr. Spice and Ms. Mathews' Estate. CP 2659. The October 5, 2012 decree (Probate Decree)

[10] "My Mom was promised the City of Puyallup was going to cough up a fortune from being denied water rights." CP 3085. Further Ms. DuBois confirmed the Ted Spice personally informed her of the LUPA appeal. CP 3082-5.

allocated whole ownership of some parcels, and co-ownership of other parcels. *Id.* The Probate Decree allocates an ownership where the Subject Property is shared between Mr Spice and the Estate: "Property at 11003 58th St Ct E Puyallup included in Plexus Investments: 25% Spice 75% Dubois as PR". *Id.* Spice's property ownership in the Subject Property was upheld on appeal.[11] Thus at all times throughout the appeal, Spice and Plexus were owners of an interest in the Subject Property.

Puyallup 2013 Summary Judgement. In 2013 a new Superior Court inherited the case. CP 1494-1515. Puyallup objected to a Trial set and filed for Summary Judgment based on the unique theory that Puyallup had "won" the LUPA case, that Petitioners waited too long to act on remand, and that because the LUPA case was "final" and in Puyallup's argument, "un-appealable", then Petitioners' RCW 64.40 action also should be dismissed. CP 1652-1696. Petitioners in opposition pointed out (1) RCW 64.40 action was a cause of action distinct from LUPA which allowed Petitioners to show how and recoup damages from the harm incurred from Puyallup's failure to act from date of application to present time, (2) that the Trial Court had preserved the RCW 64.40 damages action for trial in the same order which addressed the LUPA case, in recognition that the cause of action remained viable, (3) that Petitioners actually had prevailed,

[11] *Ted Spice v. Donna E. Dubois as personal representative for the Estate of Doris E. Mathews, deceased*, No. 44101-2-II, issued on March 1, 2016.

in the LUPA action, and (4) that the LUPA order in any case remained appealable. CP 784-787. The (new) Trial Court found for Puyallup and dismissed the case, not only the Chapter 64.40 RCW claims, but also Petitioners' tort (breach of duty) and declaratory judgement causes of action, even though these issues had not been briefed in the Summary Judgement motion. CP 1141-1145. Petitioners first filed for Reconsideration CP 1146-1243, (denied CP 1365), then appealed the SJ Order. Petitioners expressly noted the passing of Ms. Mathews in the Notice of Appeal, which was filed with both the Superior and Court of Appeals and served on Puyallup. CP 1369-1381. Two months later the Court issued its Order awarding fees and cost. The Court awarded Puyallup all its fees and costs (about $135,000) for all actions in the case and did not segregate out fees associated just with the RCW 64.40 claims, or for work performed on issues for which Puyallup did not prevail. CP 2591-2592.

Puyallup's Court of Appeals Motion to Dismiss - Denied. After Petitioners appealed, Puyallup filed a Motion to Dismiss with this Appeals court, arguing the passing of one of the three Petitioners required all three Petitioners' damages action to be dismissed per CR 19.[12] Petitioners responded by demonstrating that Petitioners all held "an interest" in the

[12] Puyallup *Motion to Dismiss* on filed in Div. II Cause No. 45476-9-II.

Subject Property, and the remaining two Petitioners' cases should proceed.[13] This Appeals Court Ordered that Puyallup had **not** demonstrated that the case should be dismissed, denied Puyallup's request for attorney fees and remanded the Judgment on fees and costs back to the Trial Court[14].

Puyallup's 2014 Summary Judgement & Motion to Vacate. On remand, Puyallup renewed its same Summary Judgment on RCW 64.40 damages, arguing that Ms. Mathews was an "indispensable party," and without her, the case must be dismissed. Puyallup argued that RCW 64.40 required all owners of a Property to agree to seek damages, and unless all agreed and sought damages, none of the three could. CP 2638-2659. Puyallup also moved to vacate all Orders and final Judgements entered against all Petitioners. CP 2614-2637. Petitioners opposed and presented both facts and statutory and case law that supported Petitioners' position that any owner of "an interest or right in property" could seek damages. Thus, despite Ms. Mathews passing, the case remained viable for the remaining two Petitioners, based on their demonstrated and uncontested interest in the Subject Property. CP 2704, 2910, 3162-3171. On June 5, 2015, the Trial Court issued a verbal ruling stating its intention to grant

[13] See *Declaration of Ted Spice* on file in Div. II Cause No. 45476-9-II, Ex. 5 and *Spice Reply to Motion to Dismiss* filed in Div. II Cause No. 45476-9-II.
[14] See Appeals Court *Order on Remand on* file in Div. II Cause No. 45476-9-II, CP 3050-51.

Puyallup's Motions to Dismiss and to Vacate, " **on the basis that a necessary and indispensable party, the estate, which is apparently a 75 percent owner of the subject property, based upon the fact that they are not a party**." CP 5164-5200 at 5194-5. See Order Vacating all Orders and Judgments entered July 20, 2015. CP 3409-3421.

Puyallup's CR 11 Motion. Puyallup next pursued CR 11 sanctions against remaining Petitioners and their legal counsels. Puyallup argued: (1) Petitioners had a duty to disclose that one of the three Petitioners had passed, and (2) that all the acts and litigation after Ms. Mathew's passing was sanctionable, as it was carried out without the consent of the deceased one of three Petitioners. Puyallup sought over $300,000 in fees and costs against Petitioners and Petitioners' counsel joint and several. CP 2660-2703 and 3577-3612. Petitioners opposed.[15] Further, Seattle University

[15] Petitioners established:

- Puyallup fails its burden to justify rule 11 sanctions,
- Puyallup fails to show the criteria for imposing rule 11 sanctions are met,
- All doubts are resolved in favor of Petitioners, the non-moving party,
- The Court is required to specify the actionable conduct – here there is none,
- Petitioner's positions were supported by investigation of facts and cited law,
- Petitioners' pleadings were not baseless or frivolous,
- Alleged violations of the rules of professional conduct cannot support CR 11 sanctions.
- A Summary judgment loss is not enough to impose sanctions,
- No amount can be awarded because Puyallup failed to limit fee request, and
- Puyallup seeks impermissible fee shifting to replace the judgment which they moved to void. CP 2911-3051, 3052-3130, 3577-3612, 3150-3161, 3323-3356, 3389-3408, 3135-3149, 4723-4754, 4755-4887, 4890-4905, 4906-4917, 4918-4940, 4941-5011, 5345-5357, 5392-5452, 5358-5373

Law School Ethics Professor John Strait filed a Declaration in support of Petitioners' legal counsel and in opposition to the CR 11 Motion. CP4702-4722.Puyallup's attorneys admitted that **they found no law which supported their CR 11 Motion**. CP 5259- 5260. On December 11, 2015 the Court ruled verbally to decline to impose CR 11 sanctions against Petitioner Ted Spice and Petitioner Counsel Stephan Hanson, but imposed $45,000 sanction against Legal Counsel Carolyn Lake. TR @CP 5308-5443. Order entered April 15, 2016. CP 5501-5520.

2016 Puyallup Motion to Amend Prior Order Vacating Orders and Judgements. After the Superior Court awarded CR 11 Sanctions far less than the $300,000 plus which Puyallup had sought, Puyallup abruptly reversed course and sought to reinstate the prior Orders and Judgments which it had previously moved to vacate. CP 5063-5073 and re-filed at 5130-5142. Petitioners opposed. CP 5143-51-46, 5147-5344 and 5374-5391. On April 15, 2016, the Court re-entered an Order granting fees & costs to Puyallup in the amount of $132,790.65. CP 5521-5542. A "Supplemental Order Correcting" the April 15, 2016 Order on Fees entered on May 20, 2016, along with Final Judgements on the CR 11 and RCW 64.40 Orders. CP 7528-7529, 7530-7531, 7532-7533.

2016 Petitioner Motion for Discovery. Petitioner Ted Spice moved for the Court to allow discovery on the issue of when Puyallup learned of the

passing of Ms. Mathews, based on pleadings filed in bankruptcy court which indicated that the personal representative of Ms. Mathew's estate had been in contact with Puyallup attorney and officials shortly after Ms. Mathew's passing, putting Puyallup on notice. CP 5018-5031. The Court denied the relief. CP 5060-5062.

IV. STANDARDS OF REVIEW

A. LUPA APPEAL

The scope of review in LUPA actions is governed by RCW 36.70C.130(1), under which the court may grant relief if the party seeking relief can establish that one of the following standards is met:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing such deference as is due the construction of the law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional right of the party seeking relief.

RCW 36.70C.1301(a)-(f). Standards (a), (b), (e) and (f) present questions of law for which the accepted standard of review is *de novo*. *7 Wash. State Bar Ass'n, Real Property Deskbook § 111.49, at 111-25.*

Standard (c) is reviewed under the "substantial evidence" standard of review, which is defined as "a sufficient quantity of evidence to persuade a fair minded person of the truth or correctness of the order." *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), (quoting *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *rev. denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997). The clearly erroneous test for (d) is whether the court is "left with a definite and firm conviction that a mistake has been committed." *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1987). If Petitioners show that Pierce County's actions fall within any of the standards, this Court is required to grant relief.

B. OTHER STANDARDS OF REVIEW

Summary Judgement. An appellate court reviews a trial court's grant of summary judgment de novo, affirming only if no genuine issues of material fact exist, viewing the evidence in the light most favorable to the nonmoving party. *Arp v. Riley*, 192 Wn. App. 85, 366 P.3d 946, (Wash. Ct. App. 2015).

Attorney Fee Award. An appellate court applies a two-part standard of review to a trial court's award or denial of attorney fees: (1) the appellate court reviews de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) the appellate court

reviews a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion. In re Wash. Builders Benefit Trust, 173 Wn. App. 34, 293 P.3d 1206, 2013 Wash. App. (Wash. Ct. App. 2013).

V. ANALYSIS

A. TRIAL COURT ERRED IN NOT GRANTING PETITIONERS' REQUESTED RELIEF TO FIND PUYALLUP BREACHED ITS DUTY TO PROVIDE WATER SERVICE

Early on in this case, Petitioners moved for Summary Judgement and relief on the legal issues of (1) Puyallup's breach of its duty to provide water service to Petitioners' property pursuant to State laws and the Pierce County Water System Coordinated Plans. (2) Puyallup's improper attempt on appeal to contest previously un-appealed HE Findings and Conclusions in this case, and (3) the Pierce County Examiner's authority to require Puyallup to provide water service pursuant to PCC 1.22.080.C and PCC Section 19D.140.090(H). CP 341-366 and CP 367-435. These are questions of law, and should have been properly resolved in favor of Petitioners on Summary Judgment. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *City of Spokane v. County of Spokane* (2006) 158 Wash.2d 661, 146 P.3d 893. *McNeil v. Powers,* 123 Wash.App. 577, 97 P.3d 760 (2004), as amended. Summary judgment should be granted if

reasonable persons could reach but one conclusion from the evidence presented. *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC* 134 Wash.App. 210, 135 P.3d 499 (2006), *amended on denial of reconsideration, review denied* 2007 WL 2200166. *Korslund v. Dyncorp Tri-Cities Services*, Inc., 156 Wash.2d 168, 125 P.3d 119 (2005). Based on the undisputed facts and relevant law, the Superior Court erred in not granting Petitioners' relief as a matter of law.

1. Puyallup Breached Its Duty to Provide Water Service.

a. State Law Dictates Water Service Delivery, Establishes Exclusive Water Service Delivery Areas, And Requires Duties From Established Water Providers.

The state Public Water System Coordination Act (RCW 70.116) provides the legal mechanism to establish exclusive water utility service areas within areas designated as "critical water supply service areas". CP 106, 119, 120. The Water Service Coordination Act requires that water service area boundaries be established by written agreement among the various state purveyors, including cities and counties. CP 97, 100, 119. The regional water service plan that encompasses the service area boundaries in Pierce County is the CWSP or Water Plan. CP 120. Pursuant to SA-Policy 10, exclusive water service areas are established per the CWSP when a jurisdiction signs a Standard Service Area Agreement. CP

637.[16] Puyallup submitted a Standard Service Area Agreement Establishing Water Utility Service Area Boundaries to Pierce County on August 29, 1994. CP 122. The Water Plan establishes Puyallup's exclusive water service boundaries as a water purveyor providing water service within Pierce County, pursuant to the state Water Coordination Act, which includes Petitioners' Subject Property. CP 108, 122. Puyallup, as a local water purveyor, is a signator to and bound by the Water Plan. Puyallup's Service Area Agreement requires Puyallup to assume full responsibility for providing water within service area[17].The PC Water Plan at relevant times was implemented by provisions of Pierce County Code (PCC) Ch. 19D. 140, which included a process to resolve disputes between customers such as Petitioners and the local water purveyor, here Puyallup.PCC §19D.140.090. CP 97, 122, CP 619-20. At relevant times, PCC Section 19D.140.090(F)(2) specifically called for referral of disputes to the "Pierce County Hearing Examiner for final resolution" under the PC

[16] "Following completion of the service area boundary agreements and approval of the associated Water System Plans by DOH and the County, the service areas established under the procedures of the CWSP are considered to be legally binding and exclusive for all public water systems in Pierce County.... "PC Water Plan, page II-3. CP 686-661 at 636.

[17] Municipalities further agree that if they identify a service area outside of their existing municipal corporate boundaries, the municipality will assume full responsibility for providing water service equivalent to the level of service provided for their customers inside the city limits with similar service requirement, and must also meet or exceed Pierce County's minimum design standards.
CP 586-661 at 651 and 649. Emphasis added.

Water Plan. (Emphasis supplied.) CP 122-3. 629-20.

b. Puyallup's Duties Established Pursuant to RCW 70.116 "Public Water System Coordination Act"

The creation of Puyallup's exclusive water service areas trigger duties to be performed by Puyallup. First, Puyallup as an Exclusive Water Service provider has a duty to provide all public water service within this designated boundary, including Petitioners' Subject Property. Second, the designation also places a duty on Puyallup, as the designated purveyor, to provide service in a timely and reasonable manner. The CWSP defines timely services as "receiving a commitment to provide service, or the reaching of an agreement with the potential customer, within 120 days of request of water service. The 120-day time period shall be defined as calendar days." CP 124 and 586-661 at 639.

c. Puyallup's Duties Established Pursuant to RCW 43.20 "Municipal Water Supply, "Efficiency Requirement Act."

In addition to the PC Water Plan duties, Puyallup also is required to provide water service to all new retail customers within its retail services areas once the City's Plan is approved by Department of Health, pursuant to state law, specifically the "Municipal Water Law" (Municipal Water Supply, Efficiency Requirements Act, Chapter 5 Laws of 2003) (43.20 RCW), RCW 43.20.260.

d. HE Correctly Determined Puyallup Breached Its Duty to Provide Water Service.

The HE correctly applied state and county law to rule that Puyallup breached its duty to provide water service to Petitioners. On the issue of duty, the HE determined critical facts and conclusions of law.

> 5. It is **undisputed** that the city of **Puyallup is the exclusive water provider** for this particular parcel.
> 3. ...**Clearly timely water service is not being provided by the City of Puyallup** given that they have not to this day agreed to provide water service.
> (Decision) "**Puyallup is unwilling to provide timely and reasonable water service to the Applicant's parcel.**"

HE 2005 Decision CP 122-24.

> 3. ... It is undisputed that the City of Puyallup is currently providing water to the site. It is also undisputed that the City of Puyallup is refusing to provide water to the site unless certain conditions are satisfied. **It is also undisputed that this area is within the City of Puyallup's exclusive water service area.**
> 4. **No representative from the City of Puyallup contested any of these facts.**
> 9. **The City of Puyallup is unwilling to provide timely and reasonable water service to the Applicant's parcel.**

CP 129-131. Further, the HE also found in his 2007 ruling that Puyallup is bound by these prior Decisions:

> No appeals were filed, therefore, this Decision on Reconsideration remains in full force and effect.
>
> ***
>
> **The previous decision is the "law" for this case. The City of Puyallup had ample opportunity to argue their position at the previous hearing, yet failed to even appear at that hearing.**

CP 101-2. It is undisputed that Puyallup did not appeal any of the HE Decisions in this matter. The undisputed and un-appealed facts established that the Subject Property is within Puyallup's retail service

area, as established by Puyallup's DOH-approved WSP. Puyallup had a duty to serve Plexus pursuant to RCW 43.260. Thus, Puyallup breached its duties as exclusive water service provider pursuant to RCW 70.116, the Pierce County Water Plan, Puyallup's Standard Service Area Agreement, RCW 43.20, and Puyallup's DOH approved water system plan. Based on the undisputed facts and the state water law, the Superior Court erred in not granting Petitioners' LUPA appeal that Puyallup breached its duty to provide water to Petitioners. CP341-366.

2. As A Matter Of Law, Neither Pierce County Nor Puyallup May Contest Findings Or Conclusions From The Hearing Examiner Rulings Which They Did Not Appeal.

The HE's 2005, 2006, 2007 Rulings, with their Findings of Fact and Conclusions of Law, are the settled law of the case, which neither **Puyallup nor the County appealed**. The HE's rulings remain verities. *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wash.2d 169, 175, 4 P.3d 123 (2000). Puyallup cannot use Petitioners' appeal as a substitute forum to attempt their tardy challenge. Accordingly, the Superior Court erred in not finding as a matter of law that Puyallup had a duty and breached its duty to serve Petitioners' site.

a. Land Use Petition Act Is Exclusive Means & Contains Firm Deadlines to Appeal.

The Land Use Petition Act (LUPA), Chapter 36.70C RCW is the exclusive means of judicial review of land use decisions. *Grandmaster*

Sheng-Yen Lu v. King County, 110 Wash.App. 92, 38 P.3d 1040 (2002).[18] Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner. RCW 36.70C.010. *Chelan County v. Nykreim,* 146 Wash.2d 904, 929, 52 P.3d 1 (2002). Under LUPA, judicial review must be initiated by filing a land use petition within 21 days of issuance of a land use decision. RCW 36.70C.040(3). Unless the petition is timely filed and served, review is barred. RCW 36.70C.040(2). *Samuel's Furniture, Inc. v. Dep't. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002); *Chelan County v. Nykreim,* 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Skamania County v. Columbia River Gorge Comm'n,* 144 Wn.2d 30, 49, 26 P.3d 241 (2001), *Habitat Watch v. Skagit County,* 155 Wash.2d 397, 120 P.3d 56 (2005), *Asche v. Bloomquist (2006) 133 P.3d 475.*

b. The HE's Decisions were Land Use Decisions under LUPA.

Under the Land Use Petition Act (LUPA), Chapter 36.70C RCW a *land use decision* is defined as:

---

[18] **Before LUPA**, a line of Washington cases held that an improperly approved permit is void and may be rescinded by the agency which erroneously issued it. **Post-LUPA**, land use decisions, even those of questionable legality, "become valid once the opportunity to challenge each has passed." *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wash.2d 169, 175, 4 P.3d 123 (2000).

(1) ··· a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a *project permit* or other *governmental approval* required by law before real property may be *improved, developed*, modified, sold, transferred, or used.

RCW 36.70C.020(1) (emphasis added). RCW 36.70B.020(4) also reads:

(4) "Project permit" or "project permit application" means *any land use or environmental permit or license required from a local government for a project action*, including but not limited to building permits, subdivisions ··· permits or approvals required by critical area ordinances, site-specific rezones····

Here, the Plexus property is within Puyallup Water Service Area. The property ***currently receives*** water service from the City of Puyallup. As part of its development plans, Plexus Investments LLC was proposing to demolish the existing homes to build an office warehouse facility on the site. This action requires a "water availability letter" from Puyallup. The HE found that Puyallup is the exclusive service provider for Petitioners' property and that Puyallup failed to timely act to provide water service because the property was not currently in the process of being annexed. Plexus sought resolution through the dispute resolution process of the Pierce County Water Plan and the Public Water System Coordination Act, Chapter 70.116 RCW. That dispute process resulted in the HE's Decision, and Ruling on Reconsideration. The Water Dispute Ruling was pursued to allow land development. Thus, the HE's rulings were final determinations and or permit required by law before the Plexus real property could be

improved or developed, and were thus subject to LUPA appeals.

c. Puyallup's /County's Failure to Timely Challenge HE Rulings Bar Any Later Challenge.

Puyallup/ County's failure to timely challenge any of the HE's 2005, 2006, and 2007 rulings bars any challenge, and also **validates** those rulings, despite any later disagreements claimed by these parties. *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wash.2d 169, 175, 4 P.3d 123 (2000); *Nykriem, at 932, Asche v. Bloomquist,* 133 P.3d 475 (2006). Even if Puyallup later viewed the rulings faulty, the failure of Puyallup and County to timely challenge the ruling **renders the rulings valid.**

3. State Has Pre-Empted Water Service Laws & Puyallup May Not Unilaterally Amend State Law & County Plans By Declaring Itself Not An Exclusive Service Provider.

The State has pre-empted local jurisdictions in the area of water service and rules for purveyors. Puyallup cannot unilaterally, by local ordinance, escape the city's duties and responsibilities for providing water service as required by state law.

a. Puyallup Cannot Unilaterally Evade Its State Mandated Duty to Provide Water.

Because the designation of "exclusive service provider" carries with it an obligation to provide water service, at relevant times, Puyallup sought to evade these duties by unilaterally declaring itself not to be an exclusive provider with its city code. Puyallup Municipal Code 14.22.005(3). CP

250-252. PMC. 14.22.007 (as it read during relevant times in this appeal). Id. However, based on its many regional agreements, and pursuant to the state laws upon which they are based, Puyallup may not unilaterally amend state law & county plans by declaring itself not an exclusive service provider.

b. Puyallup's Attempts By Local Ordinance to Elude Duties Mandated By State Is Barred By State Pre-emption of Water Supply Plans.

A city is preempted from enacting ordinances if the legislature has expressly or by implication stated its intention to preempt the field. *Brown v. City of Yakima*, 116 Wn.2d 556, 560, 807 P.2d 353 (1991). **When the legislature has expressly stated its intent to preempt the field, a city may not enact any ordinances affecting the given field.** *Id.* Emphasis added. **Local power ends when the state legislature adopts a law concerning a particular interest,** unless the legislature has left room for concurrent jurisdiction. *Lenci v. City of Seattle*, 63 Wn.2d 664, 669, 388 P.2d 926 (1964). **When the state's interest is paramount or joint with the city's interest, the city may not enact ordinances affecting the interest unless it has been delegated that authority.** *Massie v. Brown*, 84 Wn.2d 490, 492, 527 P.2d 476 (1974). Emphasis added. An ordinance will be found to be invalid (1) **if a general statute preempts city regulation of the subject or (2) if the ordinance directly conflicts with**

a state statute. *Brown*, 116 Wn.2d at 559. Both such pre-emption situations are present here. Applicable to this issue, the State pre-empts local government in the field of water service delivery and water system plans. The State's pre-emption is evidenced throughout the two primary state water law statutes: the Public Water System Coordination Act (RCW 70.116), and the Municipal Water Supply, Efficiency Requirements Act, (Chapter 5 Laws of 2003) (43.20 RCW).[19]

Preemption occurs when the Legislature states its intention either expressly or by necessary implication to preempt the field. *Kennedy v. Seattle*, 94 Wn.2d 376, 383- 84, 617 P.2d 713 (1980). **Where the Legislature "affirmatively expresses its intent, either to occupy the field or to accord concurrent jurisdiction, there is no room for doubt."** *Lenci v. Seattle,* 63 Wn.2d 664, 669-70, 388 P.2d 926 (1964).

---

[19] The [state] legislature hereby finds that an adequate supply of potable water for domestic, commercial, and industrial use is vital to the health and well-being of the people of the state. Readily available water for use in public water systems is limited and should be developed and used efficiently with a minimum of loss or waste.In order to maximize efficient and effective development of the state's public water supply systems, the [state] department of health shall assist water purveyors by providing a procedure to coordinate the planning of the public water supply systems.
RCW 70.116.010-*Legislative declaration. And see*: RCW 70.116.020 -*Declaration of purpose*The purposes of this chapter are:

(1) To provide for the establishment of critical water supply service areas related to water utility planning and development;
(2) To provide for the development of minimum planning and design standards for critical water supply service areas to insure that water systems developed in these areas are consistent with regional needs;
(3) To assist in the orderly and efficient administration of state financial assistance programs for public water systems; and
(4) **To assist public water systems to meet reasonable standards of quality, quantity and pressure.**

Once a Water System Coordinated Plan is approved by the State, local purveyors, including the City of Puyallup, are **required** to act in conformance with the State-approved plan.[20] Puyallup's Water Service Area is created via the County's Coordinated Water System Plan and Puyallup's Water Service Area Agreement, all adopted in conformance with **state** law Chapter 70.116 RCW. Puyallup's Water System Plan is approved by the **State** Board of Health, in conformance with Chapter 43.20 RCW. Each of these **state** laws impose a duty upon the **City** of Puyallup to provide water service to Plexus, as a retail customer (RCW 43.20.260), and as a property with Puyallup's adopted and exclusive service area (RCW 70.116 through Pierce County's State approved CWSP, page II-3). Puyallup's attempt to elude these duties through adoption of local ordinances **fails** because Puyallup's local ordinances **impermissibly conflict with state** law, in this area of law which the State pre-empts. The State has adopted an elaborate, hieratical water service plan approval process which ultimately requires **State** approval of the **local** plan and thereafter requires **local conformance with the state-approved plan.** This carefully crafted hieratical process would be rendered meaningless and absurd if every local purveyor could simply opt

[20] (3) Following the approval of a coordinated water system plan by the secretary: **(a) All purveyors constructing or proposing to construct public water system facilities within the area covered by the plan shall comply with the plan.** RCW 70.116.060.

out of state imposed duties by passing a conflicting local ordinance, unilaterally "vetoing" its state imposed duties. Allowing a local **city** to bypass its compliance with **state**-approved water system plans, where the state has preempted the field, also runs afoul of the "purpose" of the state's water system plan approval legislation.[21] Puyallup's conflicting ordinance must yield to the state statutes which impose the duty to serve since the statutes preempt the field, leaving no room for concurrent jurisdiction, *Diamond Parking, Inc. v. Seattle,* 78 Wn.2d 778, 781, 479 P.2d 47 (1971), and or since a conflict exists such that the two cannot be harmonized. *Spokane v. J-R Distribs., Inc.*, 90 Wn.2d 722, 730, 585 P.2d 784 (1978).

c. Case Law Also Requires Service Where Purveyor Is Sole Provider.

Washington Courts recognize a duty to provide service where a city" holds itself out" (1) as willing to supply sewer or water service to an area, or (2) where a city is the exclusive supplier of sewer or water service in a region extending beyond the borders of the city. *Yakima County Fired*

---

[21] **The [state] legislature hereby finds that an adequate supply of potable water for domestic, commercial, and industrial use is vital to the health and well-being of the people of the state.** Readily available water for use in public water systems is limited and should be developed and used efficiently with a minimum of loss or waste.
In order to maximize efficient and effective development of the state's public water supply systems, the [state] department of health shall assist water purveyors by providing a procedure to coordinate the planning of the public water supply systems.
RCW 70.116.010-*Legislative declaration. And* RCW 70.116.020 -*Dec of Purpose.*

Protection District No. 12 v. Yakima, 122 Wn, 2d 371, 858 P.2d 245 (1993) at 381-2, *citing Barbaccia v. County of Santa Clara*, 451 F.Supp. 260, 264 n. 2 (N.D.Cal.1978). In this matter, as *Yakima*, Puyallup has entered into specific agreements defining its water service outside of its jurisdictional limits. *See also* PMC Chapter 14.22. By the agreements, the City is "holding itself out" as a public utility provider. *Id* at 382-3."The City is the exclusive provider of water and sewer service to the UGA. As such, it owes a public duty to serve all the land within the UGA, subject to such reasonable conditions, if any, as the law may allow." *Nolte v. Olympia*, 96 Wn.App. 944, 982 P.2d 659 (1999) (emphasis added). Therefore, Puyallup may only subject provision of water service to lawful conditions.

Generally, a jurisdiction may bargain for development standards in exchange for extending utilities beyond its limits. RCW 25.67.310. This policy is based on "contract" theories where two entities with equal bargaining positions may negotiate to reach mutually agreeable terms. However, the rules change when a jurisdiction holds itself out as the exclusive utility service provider. In such a case, the jurisdiction may not extract concessions from the property owner as a condition of providing the service. *Yakima County Fire Protection District No. 12 v. Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993) This makes sense when applying

contract law principles. If one party holds all the bargaining leverage, it is inherently unfair to allow the party with a "monopoly" on a required service to dictate terms to the other party. Put another way, contract law assumes a willing buyer and seller in an arm's length transaction. If the jurisdiction is the sole provider of the utility (water), and also withhold approval for other options for servicing the property (for example, Group A well), the element of equal bargaining power disappears. The law says the property owner cannot be held hostage to terms demanded by a jurisdiction if that jurisdiction is the sole source of the required utility.[22]

4. As A Matter Of Law The Examiner Had Authority To Require Puyallup To Provide Water To Petitioners' Parcel.

The HE and Trial Court erred in not expressly finding that the PC HE had authority to require Puyallup to provide water to the Petitioners' parcel in 2004, based on (1) this Court's ruling in the published Opinion *Stanzel v. City of Puyallup* 150 Wash.App. 835, 209 P.3d 534, Wash. App. Div. 2, 2009, (b) the prior uncontested HE rulings in this case, and (3) rules of statutory construction as applied to the clear language of the County Code and the County Council's broad delegation of powers. The HE is authorized to "readjust the water service area boundaries ...**and or impose reasonable conditions** pursuant to PCC 1.22.080.C to ensure

[22] The Court of Appeals Division II confirmed this analysis with its decision in *Nolte v. Olympia*, 96 Wn.App. 944, 982 P.2d 659 (1999).

timely reasonable service." PCC 19D.140.090(H). Emphasis added.

a. This Court's *Stanzel* Case Directly on Point & Finds the PC HE Has Authority.

In *Stanzel*[23], this Appeals Court found that the PC HE had authority to require Puyallup to provide water under exactly the facts as here.

> The distinction that the hearing examiner drew in this case was that Stanzel was already an existing water customer and the City was already providing him with residential water service... The hearing examiner noted that the City agreed in 1994 to provide water service to an area including this particular property. The hearing examiner noted that the City had correctly argued that a municipality cannot be compelled to provide water outside its corporate limits, ***but distinguished this case on the fact that the City was already providing him water.***
>
> **
>
> Accordingly, we hold that the hearing examiner, in this fact pattern, had authority to place a reasonable condition on the City such that it would not require Stanzel to sign a pre-annexation agreement to use City water because Stanzel was unable to seek service elsewhere, either by private well or secondary water provider.

Stanzel at 840. Ted Spice testified in his declaration that the *Stanzel* facts and his are identical as both Stanzel and present Petitioners were residential water service customers of Puyallup and sought merely to change to commercial water service from Puyallup, but were denied the ability even to complete the Puyallup application process. CP 988-990. The Court of Appeals in *Stanzel* described the intertwined relationship of the *Stanzel* case to the Plexus case:

> 8 Stanzel brought a motion before the Pierce County hearing examiner

[23] *Puyallup, Stanzel v. Puyallup, Stanzel v. City of Puyallup* 150 Wash. App. 835, 209 P.3d 534, Wash. App. Div. 2, 2009 CP 4783-4793. Copy attached.

> as a part of a separate case involving one of Stanzel's neighboring properties, a company named **Plexus Investments, LLC**, seeking an order that would compel the City to provide him with commercial water service and an availability letter. Over the City's jurisdictional objections, the hearing examiner heard Stanzel's case while acknowledging that Stanzel did not go through the City's normal dispute resolution process. **The hearing examiner based the decision to hear Stanzel's motion on the hearing examiner's decision in the Plexus hearing,** where the hearing examiner ruled that the Pierce County Code allowed property owners outside of the city limits to go directly to the hearing examiner to resolve disputes.

Id. Puyallup's treatment of Stanzel is identical to Puyallup's treatment of Petitioners here, and the same remedy should apply, that the PC HE was authorized to require Puyallup to provide water service without annexation:

> Stanzel went to the City's utilities department and asked for a commercial water availability letter. Stanzel brought with him a June 25, 2004 letter, describing his ***839** request. He delivered the letter along with the County's water availability form and presented it to city employee **Colleen Harris.** Harris informed Stanzel that the. City was no longer providing water availability letters for property outside its city limits.... Harris informed Stanzel that if he changed the property use from residential to commercial, the City would cut off his water service....Stanzel noted that the City had changed its code requirements, which now stated that the City would not provide fire flow or water availability letters unless there was an active annexation in the area and the property owner agreed to annexation. Stanzel testified that the property owners in the area, including the church property, had addressed the issue of annexation to the City in a recent election, ultimately deciding against annexation. Stanzel did not want to annex to the City.
> ¶ 6 Stanzel investigated other water service providers, including a water utility in nearby Edgewood. Edgewood informed Stanzel that it did not have distribution lines available to Stanzel's property and that all water service agreements are filed with Pierce County per Washington code. ...

> ¶ 7 On August 9, Stanzel wrote another letter to the City again requesting water service, this time directed to Tom Heinecke. Again, the City did not respond.
> Stanzel brought a motion before the Pierce County hearing examiner as a part of a separate case involving one of Stanzel's neighboring properties, a company named **Plexus Investments, LLC**, seeking an order that would compel the City to provide him with commercial water service and an availability letter. Over the City's jurisdictional objections, the hearing examiner heard Stanzel's case while acknowledging that Stanzel did not go through the City's normal dispute resolution process. The hearing examiner based the decision to hear Stanzel's motion on the hearing examiner's decision in the **Plexus** hearing, where the hearing examiner ruled that the Pierce County Code allowed property owners outside of the city limits to go directly to the hearing examiner to resolve disputes.

Stanzel at 839-40.

b. Statutory Authority Applied to HE's prior Rulings & Code Language Supports that HE Has Authority.

In the HE's prior rulings, he also made the following specific Findings/Conclusions which recognize this authority to require a recalcitrant water purveyor to serve customers within their service area:

> 2. Unlike other land use determinations, **the Coordinated Water System Plan allows broad authority to the Examiner to ensure that customers are permitted to obtain water.**
> 4. Although a reconsidered decision will not go so far as to ultimately require the City of Puyallup to provide water service, a conclusion will be added that will allow the Plexus Investments LLX to come back to the Examiner if ultimately there is no other reasonable alternative water source.
> **7. If either a Group A well water system or any other water system is not feasible for the applicant, then the Petitioners can request from the Hearing Examiner that the City of Puyallup be required to provide water to the site.**

2006 HE Decision, CP 130-131.

> 7. The above quoted sections [PCC Section 19D.140.090(H)] **authorize the Examiner to** re-adjust the City's water service

> boundaries **and or impose reasonable conditions to ensure timely and reasonable service.**

2005 HE Decision. CP 123. Rules of statutory construction require that the Examiner give meaning to all language of PCC 19D.140.090(H). Construction that would render a portion of a statute meaningless or superfluous should be avoided. *Seto v. American Elevator, Inc.*, 154 P.3d 189, Wash., (2007). It is a well-established rule of statutory construction that courts will construe language of a statute to make it purposeful and effective, rather than futile and meaningless. *Denning v. Quist,* 1933, 172 Wash. 83, 19 P.2d 656; *DeGrief v. City of Seattle,* 1956, 50 Wash.2d 1, 297 P.2d 940. *Dautel v. Heritage Home Center, Inc., 948 P.2d 397* (Wash.App.Div.1, 1997), (The purpose of statutory construction is to give both content and force to language used by Legislature.) Further, in its delegation of powers, the County legislative body granted the Examiner full authority to impose all conditions necessary to achieve compliance with state law.

> When acting upon any of the above specific applications or appeals, **the Examiner shall have the power to attach any reasonable conditions found necessary to make a project compatible with** its environment **and to carry out the goals and policies of** the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or **State law, case law** or Shorelines Hearing Board decisions.

PCC 1.22.080.C- *Decision of Hearing Examiner.* Based on (1) the published *Stanzel* decision, and unchallenged findings of this case, (2)

rules of statutory interpretation and the scope of authority delegated to the Examiner, the HE and the Superior Court erred in not granting Petitioners' LUPA Appeal and requested relief to find as a matter of law that pursuant to PCC 1.22.080.C and PCC Section 19D.140.090(H), the HE was empowered to impose reasonable conditions on Puyallup to delete the requirement of annexation and to provide continued water service to Petitioners.

B. SUPERIOR COURT ERRED IN DISMISSING PETITIONERS ALTERNATIVE CLAIM OF DECLARATORY RELIEF.

Pursuant to the terms of the Declaratory Judgment Act, Chapter 7.24 RCW, a controversy existed and exists between the Petitioners and Puyallup as to the meaning of contracts, ordinances and statutes set forth herein. If on appeal, the Court concludes that the HE did not have jurisdiction over the controversy regarding the rights of Petitioners to receive water from Puyallup, then the Court should review and decide whether Petitioners are entitled to receive water from Puyallup under the contracts, ordinances and statutes set forth herein. Under the authorities cited above, the Superior Court erred in not entering an Order that Puyallup was required to provide water to Petitioners' property for all legal uses thereon and to issue a Water Availability Letter to Petitioners in 2004.

C. COURT ERRED IN GRANTING PUYALLUP 2013 SUMMARY JUDGEMENT WHICH DISMISSED PETITIONERS' DAMAGES UNDER CHAPTER 64.40 RCW

The Petitioners' claims included the relief afforded by Chapter 64.40 RCW, based on Puyallup's failure to act on Petitioners' water service since 2004. RCW 64.40.020 creates a cause of action for "owners of a property interest" to obtain relief from relief from [an agency's] failure to act within time limits established by law:

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, **or relief from a failure to act within time limits established by law:** PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

RCW 64.40.020. The purpose of the statute was to provide "some measure of relief for applicants who are mistreated" by arbitrary and capricious government action, **or lack of action**. *See Smoke v. City of Seattle*, 79 Wn.App. 412, 902 P.2d 678 (1995)(citing Senate Journal, 47th Legislature (1982), at 1449). Puyallup's primary argument in its 2013 Motion to Dismiss the RCW 64.40 damages were that Petitioners never exhausted administrative remedies or filed an application with Puyallup. Puyallup's arguments are flatly contrary to the HE's Findings and Conclusions (verities now) and are pure red herrings. Instead the record of this case unequivocally shows Petitioners here established chapter 64.40 damages

as follows:

- Petitioners all held an interest in the Subject Property[24]
- Puyallup "**failed to act**" (issue Petitioners' water service)[25]
- "**within the time a state statute or a local ordinance requires**" (The Pierce County Coordinated Water System Plan defines "timely service" as receiving a commitment to provide service within 120 days of the request. Clearly more than 120 days have passed. *Id.)* [26]

---

[24] From at least February 28, 2004 (execution of the DPOA) through August 29, 2007, the date of filing the LUPA 2 Appeal, Petitioners had various interests in the Subject Property, including:

- Ms. Mathews' initial ownership of the Subject Property, and Mr Spice held a 33% interest holder in the subject property, by Quit Claim Deed dated December 1, 2007 and recorded June 3, 2009. By that Deed, Ms. Mathews deeded a one-third interest to Ted Spice in the property which is subject to this LUPA and damages claim. CP 4879.
- By Quit Claim Deed dated June 9, 2009 and recorded December 21. 2009, Ms. Mathews deeded the remaining two thirds interest to Ted Spice in the property which is subject to this LUPA and damages claim. CP 4880.
- Mr. Spice's as managing partner status per the Plexus Investments, LLC Operating Agreement (authority to "oversee any current projects or going concerns"),
- As a member of Plexus Investments, LLC, Mr Spice also held title to the property, ("Members shall have authority to act on behalf of company,"), and
  - Mr. Spice had been granted broad powers to act as Ms. Mathews' attorney-in-fact through the February 28, 2004 DPOA. The DPOA includes the express power to sue to enforce Mr. Mathews' property rights.

[25] 5. It is **undisputed** that the city of **Puyallup is the exclusive water provider** for this particular parcel.
3. ...Clearly **timely water service is not being provided by the City of Puyallup given that they have not to this day agreed to provide water service.**
(Decision) "**Puyallup is unwilling to provide timely and reasonable water service to the Applicant's parcel.**"
HE 2005 Finding 5, Conclusions 3 and Decision CP 122-124.

[26] The County Utility Staff charged with administering the Regional Water Plan Dispute Resolution Process supported Petitioners' efforts, as the following Hearing Examiner Decision summary of testimony attests:

> Appearing was SUSAN CLARK who presented the Public Works and Utilities Staff Report. She submitted previous water dispute decisions and attached them to the staff report. **She provided the background for this dispute. The Public Water System Coordination Act requires water systems to establish service areas.** The City of Puyallup is the designated service area for this particular parcel. The applicant is required to obtain water service from the City of Puyallup. **They are the exclusive provider. They City of Puyallup is required to offer timely and reasonable service to the applicant.** The site is currently used in a residential capacity, but it is zoned for

- Petitioners pursued and **exhausted their administrative** remedies under appropriate PCC Water dispute process *per Stanzel v. Puyallup, Stanzel v. City of Puyallup* 150 Wash.App. 835, 209 P.3d 534, Wash. App. Div. 2,2009:

  - Petitioners sought out the proper remedy dictated by the Regional Water Plan, to which at that time, Puyallup was bound.[27]

  - Petitioners applied to the Pierce County Hearing Examiner, the office ***precisely*** designated by the Regional Water Plan to arbitrate and remedy disputes between purveyors and customers. See then applicable Pierce County Code Ch. 19D. 140.[28]

- Any claimed failure to exhaust remedies by filing City application is barred, as it would have been futile to do, in light of the City's declared unwillingness to provide service.[29]

---

commercial use in the Employment Center zone classification. The applicant intends to redevelop the property and wants the City of Puyallup to continue to provide water to the site. **The applicant requested water service from the City of Puyallup. On or about June, 2004, the applicant attended a pre-application meeting. He was eventually told in August that the City could not issue a water availability letter until his property was in the process of being annexed. There have not been enough signatures from property owners within the immediate area to proceed with annexation, thus the City would not issue a water service availability letter.** The Pierce County Coordinated Water System Plan defines "timely service" as receiving a commitment to provide service within 120 days of the request. Clearly more than 120 days have passed. The City of Puyallup has elected not to provider water. The applicant has requested approval to provide water by well. Staff recommends that the applicant be allowed to pursue other options for water service. Planning Staff is also asking that the Examiner rule that other applicants in the same position be allowed to pursue other options.

CP 120. Emphasis added.

[27] The Regional Water Plan was at that time implemented by provisions of Pierce County Code Ch. 19D. 140, which provisions included a dispute resolution process at §19D.140.090.

[28] The premise of Puyallup's (redundant) Second Summary Judge met Motion response and its "failure to exhaust administrative remedies argument is that Puyallup should have both the role of **adversary** and **arbitrator** to a water service dispute. This is precisely the un-even situation the regional Plan sought to avoid.

[29] 8/3/2004 Colleen Harris Memo to File: Puyallup refusal to provide water. 8/16/2004-Colleen Email to Spice Denying water Service CP 120, 122, 627-628, 1108, and the HE's determined of Puyallup's denial of water service, which are verities.

- Petitioners timey filed their ch.64.40 RCW actions in conjunction with their LUPA Petition. CP 1-28.

- Petitioners made an offer of proof to show damage due to delay as defined by *Parkridge*: **ascertainable damages for lost profits, loss of favorable financing, increased construction costs due to inflation**[30]

- No internal City process can defeat the state law remedy afforded by either the Water System requirements for service under ch 70 RCW or for delay damages relief under ch.64.40 RCW.

1. Petitioners Have Property Interest.

The statute defines a property interest as "**any interest** or **right in real property in the state**." See RCW 64.40.010(3)(emphasis added). The statute does not limit its scope to property owners, but instead to any person or entity with "any interest or right in real property." Here all Petitioners had an interest in the Subject Property and or were applicants for development. Applicants for development rights have a constitutionally cognizable property right. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, P.2d 250 (1998). In *Mission Springs,* the Washington State Supreme Court held that a developer had a constitutional property right in the grading permit it sought:

> Mission Springs had a constitutionally cognizable property right in the grading permit it sought. **The right to use and enjoy land is a property right**. *State ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654 (1928); *963 *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *West Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 50, 720 P.2d 782 (1986) (" '**Although less than a fee**

[30] Dec of Ethan Offenbecker. CP 991-1002.

> **interest, development rights are beyond question a valuable right in property.**' ") (quoting *Louthan v. King County*, 94 Wash.2d 422, 428, 617 P.2d 977 (1980)); *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 409, 348 P.2d 664, 77 A.L.R.2d 1344 (1960) ("'**Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal.**' "(Citations omitted.)) (*quoting Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W.513, 19 A.L.R. 1387 (1921)).

Id. at 962-963 (emphasis added). Moreover, in *Mission Springs,* the Supreme Court held that the developer had constitutional rights respecting the issuance of the permit. *Id.* at 963. In addition, in analyzing the due process claims brought by the developer the Supreme Court affirmed that the developer had property rights in the permit sought to be obtained, and the process relating to obtaining said permit. *Id.* At 962-963.

2. Puyallup Failed to Act Within the Time period Required.

Puyallup failed to timely act on its duty to provide water to the Petitioners under the state Water law and the PC Water Plan within the meaning of RCW 64.40.020(1). The Pierce County CWSP defines timely services as "receiving a commitment to provide service, or the reaching of an agreement with the potential customer, within 120 days of request of water service. The 120-day time period shall be defined as calendar days." CP 120. Further, pursuant to the "Municipal Water Law" (Municipal Water Supply, Efficiency Requirements Act, Chapter 5 Laws of 2003) (43.20 RCW), Puyallup breached its requirement to "provide water service to **all** new retail customers within its retail services areas once the City's

Plan is approved by Department of Health. RCW 43.20.260. Plexus was and is within Puyallup's retail service area, as established by Puyallup's DOH-approved WSP. At all relevant times, Puyallup had a duty to serve Plexus pursuant to RCW 43.260, and failed to timely act.

3. Failure to Act on Water Application is a Land Use Action.

The City's interference with the Petitioners' water rights presents an actionable RCW 64.40.020 claim. The Examiner's ruling in the Water Dispute Resolution action **is** a land use decision. *Asche v. Bloomquist* 132 Wash. App. 784, 133 P.3d 475 Wash. App. Div. 2, 2006 at 790. Land use decisions are defined by the state to be decisions on "**An application for a project permit or other governmental approval** required by law before real property may be improved, developed, modified, sold, transferred, or used...." See RCW 36.70C.020(1)(a).

4. Damages Are Proper.

An award for damages is proper under RCW 64.40.020 and RCW 64.40.010(4).[31] Damages, under the statute, are defined broadly to include "reasonable expenses and losses", excluding speculative losses or (speculative lost) profits, not non-speculative losses. In Washington lost

[31] "[d]amages" means reasonable expenses and losses, other than speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses.

profits are generally permissible elements of damage. *See Reefer Queen Co. v. Marine Constr. & Design Co.*, 73 Wash.2d 774, 440 P.2d 448 (1968). If the evidence affords a reasonable basis for estimating the loss, courts will not permit a wrongdoer to benefit from the difficulty of determining the exact amount of the loss. *Lundgren v. Whitney's, Inc.*, 94 Wash.2d 91, 98, 614 P.2d 1272 (1980). See *Cox v. City of Lynnwood,* 72 Wash.App. 1, 863 P.2d 578 (1993). *Cobb v. Snohomish County* 86, Wash.App. 223, 935 P.2d 1384(1997), *reconsideration denied, review denied* 134 Wash.2d 1003, 953 P.2d 96. *Smoke v. City of Seattle*, 132 Wash.2d 214, 937 P.2d 186(1997). The actions of Puyallup in failing to act on Petitioners application for additional water service caused damage to Petitioners within the meaning of RCW 64.40.030(4). CP 991-1002. These damages were incurred between the time Petitioners were first denied a Water Availability Letter through and including the time of hearing in this matter, and damages are ongoing.

5. Lapse of Years Doesn't Diminish Petitioners' Damages.

The present Petitioners' facts are near identical to the fact in the *Stanzel v. Pierce County* matter(s). CP 988-990, 1106-08, 1048-49. Petitioners sought not to duplicate the redundant and litigious actions of *Stanzel*, which involved two Superior Court litigation matters and at least three trips to the Court of Appeals. Petitioners' damages are not

diminished in any way because *pre-remand* the City's failure to allow Petitioners even to participate in the Puyallup water service application process prevented, delayed and damaged Petitioners, and those damages have never been remedied. P*ost-remand*, the Stanzel Hearing Examiner and Superior Court rulings already established that the annexation condition to be unreasonable, and thus unjustifiably delayed Petitioner's water service on that basis. Petitioner' damages are supported by industry experts and are expected to exceed $3,500,000. CP 988-990 and 991-1002. The Superior Court erred by dismissing Petitioners' claim pursuant to Chapter 64.40 RCW.

6. Petitioners Not Required To Exhaust City Remedies

The Superior Court also erred when it accepted Puyallup's argument that Petitioners failed to exhaust administrative remedies. This question is answered by this Court's published Opinion *Stanzel v. Puyallup, Stanzel v. City of Puyallup* 150 Wash.App. 835, 209 P.3d 534, Wash.App. Div. 2 (2009). There, Puyallup moved to dismiss Stanzel's LUPA case based on failure to exhaust administrative remedies – exactly as here. After the Superior Court denied Puyallup's Motion and Puyallup appealed, this Court of Appeals held that:

> (1) the owner was not required to exhaust remedies with city before filing petition, and
> (2) The county hearing examiner had authority to require city to provide owner with continued water service.

Stanzel pointed out that he did not fit into the category of property owners subject to Puyallup's application process, and that he did in fact comply with exhausting his remedies under the Pierce County Code (PCC). This Court of Appeals agreed with Stanzel. The same ruling applies here to Petitioners. Here, the record shows that Petitioners also falls outside of the City's application requirements because they are not seeking new or extended water service and are instead, already connected.

> ¶ 21 Stanzel contends that he falls outside of the City's application requirements because he is not seeking new or extended water service and is, instead, already connected. Specifically, Stanzel contends that PMC 14.22.010 applies only to "all applicants for the extension/connection of water or sewer service outside the corporate limits of the city." PMC 14.22.010. The hearing examiner concluded that Stanzel was already an existing customer and that he was not seeking an extension. **We agree.**

Next, *Stanzel* pointed out that "**The final action under the PCC for resolution of water service disputes is a decision by the Pierce County hearing examiner.** PCC 19D.140.090(F)(2)." The exhaustion of remedies doctrine applies "in cases where a claim is originally cognizable by an agency which has clearly defined mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought." *Smoke v. City of Seattle*, 132 Wash.2d 214, 224, 937 P.2d 186 (1997). In ***agreeing with Stanzel that Pierce County HE and not the City was the appropriate forum***, this Court of Appeals again

addressed in duplication between the Stanzel and Plexus case:

> Here, the hearing examiner acknowledged that Stanzel did not go through the normal dispute resolution process because of the outcome of one of the hearing examiner's earlier cases, Plexus Investments, in which the hearing examiner stated that properties located outside of the City of Puyallup but within Puyallup's exclusive water service provider area, could go directly to the county hearing examiner to resolve their disputes.
>
> ***
>
> **We agree that the PCC provides a forum for Stanzel to dispute the City's failure to provide him with a water availability letter as a reasonable service dispute. ..Stanzel was not required to exhaust City remedies first;** the PCC does not require a preannexation agreement; and thus, the trial court did not err in denying the City's motion to dismiss.

Id, 848. Present facts are identical to *Stanzel* in that the PCC process applies. Petitioners here followed the correct process, and were not required to follow the City process, as Puyallup argued and as the Courts' 2008 Order improperly required.

7. Doctrine of Futility Further Defeats Puyallup Claim of "No Application"

Even if somehow the *Stanzel* Appeals case is found not to apply, Puyallup cannot avoid its misdeed by failing to accept an application and then claiming dismissal based on lack of "application". The HE already found as a matter of law that Petitioners tried to file an application, but Puyallup frustrated that filing and refused to process. CP 120, 122, 627-8, 1108. Under these facts, the doctrine of futility applies, and no authority

presented by Puyallup is on point or denies Petitioners' relief.[32] When Petitioners establish that pursuing available administrative procedures would be futile, the Petitioners are excused from exhausting the available remedies before seeking judicial relief; the exhaustion doctrine. *Orion Corp. v. State*, 103 Wn.2d 441, 443, 693 P.2d 1369 (1985). "The general rule...is that a court will not require a party to exhaust its remedies if to do so is shown to be futile." *Harrington v. Spokane Cnty.*, 128 Wn.App. 202, 215, 114 P.3d 1233 (Div. 1, 2005); *citing* RCW § 34.05.534(3)(b) and *Dioxin /Organochlorine Ctr. v. Dep't of Ecology*, 119 Wash.2d 761, 776, 837 P.2d 1007 (1992). The Superior Court Erred in dismissing the RCW 64.40 claims.

8. Court Erred in Granting Dismissing Issues Not Briefed

The Trial Court also erred in dismissing, not only the Chapter 64.40 RCW claims, but also Petitioners' tort (breach of duty) and declaratory judgement causes of action, even though these issues had not been briefed in the Summary Judgement motion. CP 1141-1145. Courts review summary judgment orders de novo, performing the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93

[32] In *Stanzel v. Puyallup*, 150 Wn App 850,Stanzel raised the issue that exhaustion of remedies with the City would have been futile. He argues that completing an application and paying a high fee with the City would be futile because the City would still require him to agree to annexation as a precondition. Because the Court found the Pierce County dispute process was the proper process, the Court did not need to address this issue. The same is true here.

P.3d 108 (2004). A court may grant summary judgment if the pleadings, affidavits, and depositions establish there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hisle*, 151 Wn.2d at 861. The burden is on the moving party to prove that there is no genuine issue of material fact that could influence the outcome of a trial. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Here, Puyallup briefed only the RCW 64.40 issue, and not the tort or declaratory judgment issues, so did not meet its burden. Dismissal of these claims was error.

D. SUPERIOR COURT ERRED BY ORDER DATED JULY 20, 2015, BY FINDING ONE OF THE THREE PETITIONERS TO BE AN INDISPENSABLE PARTY, WITH THE RESULT THAT UPON ONE PETITIONER'S DEATH, THE COURT FOUND THAT THE CLAIMS OF THE REMAINING TWO PETITIONERS WERE EXTINGUISHED.

Puyallup's 2015 Motion for Summary Judgment primarily argues that CR 19 requires joinder of Ms. Mathews Estate as a necessary party, and upon her death, the remaining Petitioners were barred from pursuing their LUPA, tort and RCW 64.40 claims. [33]CP 2638-2659. The Court erred in granting that Motion for at least the following reasons. First, Plexus/ Mr. Spice possessed the requisite authority at all times, both before and after Ms. Mathew's passing, to prosecute this appeal. Second, while Superior

[33] Puyallup also Moved to vacate all Orders and final Judgements entered against all Petitioners. CP 2614-2637.

Court Civil Rule (CR) 25 addresses a process upon the death of a party, under the facts of this case, no singular burden to act is imposed on co-Petitioners of the deceased party. Third, upon Ms. Mathews' passing, her former legal counsel lacked authority to act on her behalf. That duty fell to the Estate which failed to act, including as laid out in CR 25 despite knowledge of the on-going LUPA matter. Fourth, the out-of- jurisdiction cases relied on by Puyallup to characterize this appeal as "moot" simply don't apply in Washington where CR 25 governs. Fifth, neither of Puyallup's strained reading of LUPA (chapter 36.70C RCW) or Chapter 64.40 RCW applies to restrict or defeat this case in any way. The Superior Court erred.

1. **CR 25(a) eviscerates the City's Argument that CR 19 Applies here.**

Washington Civil Rule (CR) 25 governs situations in which one party dies, and provides in relevant part:

> (a) Death.
> (1) Procedure. If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided by rule 5 for service of notices, and upon persons not parties in the manner provided by statute or by rule for the service of a summons. If substitution is not made within the time authorized by law, the action may be dismissed as to the deceased party.
>
> (2) Partial Abatement. **In the event of the death of one or more of the plaintiffs** or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, **the action does not abate. The**

> **death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.**

CR 25 is a simple rule which equally allows any party including Ms. Mathews' Personal Representative or the Court to move to substitute the Estate as a party, or to dismiss the Estate as a party. Most significantly, CR 25 goes on to provide that "**In the event of the death of one or more of the plaintiffs, the action does not abate**.....the action shall proceed in favor of or against the surviving parties." Here, Ms. Mathews' heirs had knowledge of the LUPA appeal well prior to July 2011, when Donna Dubois admitted her knowledge of the LUPA litigation[34], and were involved in at least three other litigations[35] with Mr. Spice, and testified they were aware of the LUPA action. Yet, at no time, even today has the Estate moved to substitute or dismiss Ms. Mathews as a party, some 8 years later.[36]

---

[34] See CP 3052-3130,excerpts from Volumes I, II and III of Ms. Dubois's deposition in *Spice v. Dubois*, where she confirmed her understanding of the litigation. "My Mom was promised the City of Puyallup was going to cough up a fortune from being denied water rights". CP 3085. In Volume I, beginning at p. 172, l. 21, she confirms her mother informed her about the "litigation related to the City of Puyallup" and at p. 173, beginning at lines 1 - 11, that she considered it [the litigation] a "big waste of money." Ms. Dubois confirms her knowledge of payments to "the expensive attorneys that were soaking up all the money . . . for this water litigation . . ." CP 3082-85. Ms. Dubois confirms at p. 173, 20 of her deposition that Mr. Spice personally informed her of the pending litigation..." Id.

[35] *See*: *Linnie R. Spice v. Ted Spice & Dubois, PR of Mathews*, Pierce County Super Ct. No. 09-2-10409-9; *Donna Dubois v. Ted Spice*, 10-2-11622-8; *In Re Mark & Donna, Dubois*, 13-46104-BDL (W.D. Wash. Bankr.).

[36] Mr. Spice can only surmise that that Ms. Mathews' heirs simply lurked in hopes of availing themselves of Mr. Spice's strong claims in this case and the hard work of others, and are now untimely attempting to distance themselves in light of a temporary setback.

2. In Contrast, Plexus Complied with CR 25(a)(2).

In contrast, Spice/ Plexus complied with CR 25(a)(2) to the extent that any duty exists as to them. CR 25(a)(2) provides as follows:

> (2) Partial Abatement. In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

At most, with respect to any duty by the remaining Petitioners, CR 25 provides that "The death shall be suggested upon the record". Here, fulfilling their duty if any exists, to "suggest" the death upon the record, Spice/Plexus/their legal counsel noted the passing of Ms. Mathews in their October 13, 2013 Notice of Appeal which was the first opportunity after an adverse ruling that could have consequences to the Estate. The Notice of Appeal was filed with the Trial Court and the Court of Appeals, and served on Puyallup.

3. The Court Erred In Finding Petitioners Had A Duty That Was Breached.

Puyallup's argument and the Court's acceptance that Plexus/Spice somehow acted badly or inappropriately is directly contrary to Washington State probate law on claims against estates (Chapter 11.40 RCW). Puyallup argued that the *Petitioners* in this case had some duty to

substitute after Ms. Mathews' passing. However, RCW 11.40.110[37] provides that Plaintiff must move to substitute the personal representative **only** when the decedent is the ***defendant*** in an action. Here, Ms. Mathews was a co-plaintiff, and other co-Petitioners had no duty to substitute Ms. Mathews' personal representative.

4. At All Relevant Times, Plexus/ Spice Had And Has Authority To Pursue The Relief Sought In This Lawsuit.

a. Introduction. Through the DPOA in February 28, 2004 and via Plexus Investments, LLC which remained an active entity from its inception on April 22, 2004, Mr Spice had requisite authority to act and an ownership interest prior to, at the time of filing the present LUPA action (August 29, 2007) and at all relevant times after Ms. Mathew's passing, (December 8, 2009) and throughout including the date of Appeal to this Court (October 10, 2013) through present time. The Court's October 5, 2012 Superior Court probate ruling further affirmed Mr Spice's continuing property ownership interest in the property subject of this appeal. Thus Mr. Spice had authority to sue and maintain this lawsuit on behalf of Plexus Investments, LLC as Plexus Investments, LLC's managing partner,

[37] If an action is pending against the decedent at the time of the decedent's death, the plaintiff shall, within four months after appointment of the personal representative, serve on the personal representative a petition to have the personal representative substituted as efendant in the action. Upon hearing on the petition, the personal representative shall be substituted, unless, at or before the hearing, the claim of the plaintiff, together with costs, is allowed.

and to act on his own behalf as 25% interest holder in the subject property.

b. Analysis Unquestionably Supports Spice Legal Authority. It is undisputed that Mr. Spice had authority to bring this suit as the managing member of Plexus, Investments, LLC, a company Mr. Spice formed with Ms. Mathews in 2004, as Ms. Mathews' daughter concedes.[38] This admission eviscerates Puyallup's tortured LUPA and RCW 64.40 analysis.

Under Washington's LLC Act, LLC members' interest an LLC is personal property, but the members do not have a personal interest in company property. RCW 25.15.245. Therefore, the damages complained of accrued to Plexus Investments, LLC's real property, and Mr. Spice has authority to enforce under the Plexus Investments, LLC operating agreement. That LLC has been in continuous existence since April, 2004, which predates all relevant events to this appeal for relief.

Mr. Spice also derives authority to maintain this lawsuit from the probate case. The probate case of *Ted Spice v. Dubois* resulted in a decree apportioning ownership of the 11003 58th Street Court East property twenty-five percent in favor of Appellant Spice. Both Mr. Spice and Plexus Investments, LLC interests in the Subject Property were damaged, just like Michael Stanzel, by Puyallup's unwillingness to provide water

[38] "She gave him free rein, you know, like I said, of the finances. She trusted him with the finances, you know, how to pay the bills, to buythe properties for the – she trusted him to do that. CP 3093.

service. Mr. Spice still has a significant ownership interest in the subject property. Mr. Spice is still the managing member of Plexus Investments, LLC.

Mr. Spice further derives authority to maintain this lawsuit from the power of attorney executed in 2004 by Ms. Mathews appointing Mr. Spice as attorney in fact. RCW 11.91.050[39] places only a few limits on powers of attorneys in fact, none of which apply here. The Mathews DPOA is very broad. The DPOA allows Spice to "exercise or perform any act, power, duty, right or obligation whatsoever that I [Doris Mathews] now have or may hereafter acquire[]", and also "to...sue for...tangible property and property rights..." *Id.* The DPOA also included that "I grant my agent [Ted Spice] full power and authority to do everything necessary in

[39] RCW 11.91.050: Although a designated attorney-in-fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney-in-fact or agent shall have all the powers the principal would have if alive and competent, the attorney-in-fact or agent shall not have the power to make, amend, alter, or revoke the principal's wills or codicils, and shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter, or revoke any of the principal's life insurance, annuity, or similar contract beneficiary designations, employee benefit plan beneficiary designations, trust agreements, registration of the principal's securities in beneficiary form, payable on death or transfer on death beneficiary designations, designation of persons as joint tenants with right of survivorship with the principal with respect to any of the principal's property, community property agreements, or any other provisions for nonprobate transfer at death contained in non-testamentary instruments described in RCW 11.02.091; to make any gifts of property owned by the principal; to exercise the principal's rights to distribute property in trust or cause a trustee to distribute property in trust to the extent consistent with the terms of the trust agreement; to make transfers of property to any trust (whether or not created by the principal) unless the trust benefits the principal alone and does not have dispositive provisions which are different from those which would have governed the property had it not been transferred into the trust; or to disclaim property.

exercising any of the powers granted here as fully as I might or could do if personally present." *Id.*

Next, Mr. Spice derives authority to maintain this lawsuit from the Mathews, LLC promissory note. Under that note, Mr. Spice has entitlement to the half the equity "monies realized in any amounts ranging from $5,000 up to $8,000,000 from...any type of business projects what so ever relating to....parcel number[] 77050000191. [subject property here]." This entitlement is without regard to who owns the land. The damages owed by the City are within the scope of the Promissory Note and supplemental to all of the other interests Mr. Spice and Plexus Investments, LLC have in this case. Therefore, the Court erred in dismissing their claims via CR 19.

5. Spice Ownership & Control Satisfies Chapter 64.40 RCW requirements

Puyallup concedes that the current lawsuit is a "combination Land Use Petition Act ("LUPA") appeal and a claim for damages under RCW Ch. 64.40." CP 2640. RCW 64.40.020 allows any the owner of a property interest to file suit for damages.[40] RCW 64.40.010(3) defines "property interest" as "any interest or right in real property in the state." As Puyallup

[40] "Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law."

concedes, Mr. Spice owns an interest in the subject property: "Pursuant to a jury verdict in the PCSC Case No. 10-2-11622-8, and associated judgment and order of the court, Mr. Spice was awarded 25% of the 11003 58th St Ct E property (the property at issue in this case), and the Estate of Doris Matthews was awarded the remaining 75% of the property". CP2644. Mr. Spice still has standing to proceed under RCW Ch. 64.40. In *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 890-891, 295 P.3d 1197 (2013), the exact wording of the Court's ruling is ***exactly opposite*** of Puyallup's claim. In *Manna Funding,* the appeals court dismissed the RCW 64.40 claim finding Manna's application for rezoning was not an "application for a permit" for purposes of a cause of action under RCW 64.40.020. Along the way however, the Appeals Court not once but twice referred to the right of **a property owner** to bring a RCW 64.40 action, first in summarizing the County's position and next it its own ruling:

> The County contends that RCW 64.40.020(1), by its clear terms, allows recovery of damages only to a property owner who has applied for a permit to develop the property. Since Manna's application was strictly for a rezone, it lacks standing to bring a claim under RCW 64.40.020(1). *Westway Constr., Inc. v. Benton County*, 136 Wn. App. 859, 866, 151 P.3d 1005 (2006).
>
> ***
>
> RCW 64.40.020(1) is clear that only **an owner** with an interest in the property who has filed an "application for a permit" may sue for damages under the statute.

Manna Funding at 890-891, (emphasis added)[41]. In sum, **no** Washington case law supports Puyallup's argument that ***all property owners must band together*** to request RCW 64.40 relief. This Court should reject Puyallup's invitation to strain and create new law, which restricts the very relief the legislature intended by RCW 64.40.

6. All Property owners are NOT Indispensable Parties in Land Use Cases.

The Court erred in accepting Puyallup's incorrect, tortured and outdated statutory interpretation argument that, "Washington courts have consistently held that all property owners are necessary and indispensable parties in land use cases" CP 2647. Without exception, Puyallup's cited cases are all pre-LUPA or non-LUPA writ cases. Today however, in chapter RCW 36.70C, the Land Use Petition Act ("LUPA"), the legislature expressly defined the scope of necessary parties for those types of actions. This is defined as a jurisdictional requirement that applies at the *initiation* of a LUPA CASE filing with Superior Court. See: RCW 36.70C.040: "***Commencement of review*** — Land use petition — Procedure.[42]" LUPA requires that that each person identified by name and

---

[41] Further, the RCW 64.40 *Definitions* section is in accord: RCW 64.40.010 (3) defines "property interest" as "any interest or right in real property in the state."

[42] (2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

address as an owner of the property must be made parties to a LUPA Petition. Here Ms. Mathews was properly identified as one of the property owner ***at the time this LUPA action was filed in 2007***. Thus Plexus precisely complied with the LUPA statute, which speaks only to requirements when the LUPA Petition is initially filed with Superior Court. Sadly, she passed mid-suit. Under those facts, CR 25 applies, and allows the remaining parties to pursue relief. None of Puyallup's cited cases apply.

E. THE SUPERIOR COURT ERRED BY IMPOSING CR 11 SANCTIONS.

The Court erred in granting Puyallup's Motion to Impose CR 11 Sanctions. The Court's Order (drafted by Puyallup) includes many assertions which are simply not supported by the facts or the record, not supported by Washington law, and are grossly misleading by omission of multiple and critical facts. The Court yielded to Puyallup's approach which appears to be, if one repeats something often (and loudly enough), that it somehow gains credibility. Petitioners Plexus and Spice first address the broad themes, which are continually and inaccurately repeated by Puyallup which the Court accepted in its Order. These significant

---

(b) Each of the following persons if the person is not the petitioner:
(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and
(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

points must be corrected as they are either factually untrue, not supported by the records as a whole, and or are grossly misleading by omission.

1. **Three Petitioners Brought this LUPA Petition, Tort and Damages Action, Each of Whom had Independent Separate Claims.**

a. Two Viable Petitioners Remain.

The Court's CR 11 Order repeated refers to the deceased Ms. Mathews as a ***singular*** Plaintiff. This omits the critical fact that **three** petitioners brought this LUPA petition, each of whom had independent, separate claims. The fact that two viable Petitioners remained after Ms. Mathew's passing under pins the entire rationale for Legal Counsel's authority (and legal duty) to continue to seek relief on remaining two Petitioners' behalf. Throughout this matter, Petitioners presented facts and both statutory and case law that supported Petitioners' position that ***any owner*** of "an interest or right in property" could seek damages.

i. Facts.

As to facts, Petitioners presented evidence that Mr Spice had requisite authority to act and an ownership interest prior to, at the time of filing the present LUPA action (August 29, 2007) and at all relevant times after Ms Mathew's passing, (December 8, 2009) and throughout including the date of Appeal to this Court (October 10, 2013) through present time. The facts established: Ms. Mathew's grant of the Durable Power of Attorney (DPOA) to Spice as of February 28, 2004, Spice's role as Managing

member of the Plexus Investments, LLC which remained an active entity from its inception on April 22, 2004, and two quit claims deeds in 2007 and 2009 which together gave Mr Spice 100% of the Subject Property Ownership ***prior*** to Ms. Mathew's passing.

Further Petitioners presented the October 5, 2012 Superior Court probate Order from the Estate litigation which further affirmed Mr Spice's continuing property ownership interest in the property subject of this suit. Thus Petitioners and legal counsel relied on facts to argue that Plexus and Mr. Spice had authority to sue and maintain this lawsuit on behalf of Plexus Investments, LLC as Plexus Investments, LLC's managing partner, and for Spice to act on his own behalf as at one time the 100% owner and later a 25% interest holder in the subject property.

ii. Law

Petitioners also presented law in support of their position. RCW 64.40.020 creates a cause of action for "owners of a property interest" to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority. Nothing in the statute requires the suit be brought by "all property interests." It was consistently advanced that each Petitioner had a RCW 64.40 claim and cause of action independent of the other, and no one Plaintiff was held out as the "primary" or "necessary" party. Thus, despite Ms. Mathews passing, and

based upon thorough inquiry, legal counsel maintained the case remained viable for the remaining two Petitioners, based on their demonstrated and uncontested interest in the Subject Property.

b. Legal Effect of Critical Omission Leads to Legal Error

Puyallup's and ultimately the Court's omission also impacts a further legal distinction. The law provides that if a client passes, the authority for an attorney to act for ***that client*** ceases. But that is not full story of the case here. Additional Petitioners remained. No cases cited by Puyallup stands for the proposition that when one of three Petitioners die, the authority also ceases for Counsel to continue to advocate for the claims of the remaining two Petitioners. Just the opposite is true. CR 25 (a)(2) provides that even when a deceased party is dismissed out, "the action shall proceed in favor of or against the surviving parties." That is the very scenario the two remaining Petitioners and their counsel faced. [43] Thus when the Court's CR 11 Order repeatedly refers to "their client, Ms. Mathews was dead," but then omits completely that two Petitioners remained, the entire legal completion changes. While the law is clear that the death of a sole clients ends the attorney's authority to act for that

[43] See CR 25 (a)(2), "(2) Partial Abatement. **In the event of the death of one or more of the plaintiffs** or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, **the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.**

client[44], no law forbids continued representation of multiple clients when only **one of three** passes. Puyallup, by its insistence on characterizing the deceased as a singular petitioner, appears to concede that the presence of the additional petitioners has a legal significance it seeks to avoid.

Legal Counsel has maintained that every pleading filed since the passing of the one petitioner was done to protect the interest of the remaining two. All actions taken were grounded in the facts and law that **each** Petitioner had an interest in the property that supported the damages claim. The passing of one Petitioner terminated the attorney client relationship as to that deceased party, such that Petitioners' counsel had no further authority to bind or reach settlement for the deceased. But based upon legal counsel inquiry on the facts and the law, Petitioners' counsel had a continuing duty to the remaining Petitioners, Spice and Plexus.

2. Puyallup's and Court's Order Inaccurately Describes the Actual Ownership of the Subject Property.

The Court's Order ignores that the record amply establishes the evolving ownership interests in the Subject Property held by the three Petitioners. The Order clings to two isolated and static snapshots of ownership: (1) its inaccurate by omission description of Ms. Mathews as

---

[44] "The authority of a deceased party's attorney ceases upon the death of that party " *Campbell v. Campbell*, 878 P.2d 1037, 1042 (Okla. 1994). "The attorney cannot represent a dead person; and, upon such death, the real party in interest is the personal representative or heirs." Id. Quoted in Puyallup Brief at CP 2677.

the (sole) fee owner of the property in the complaint, and (2) the ownership interest as awarded by the Probate Court by Order dated October 5, 2012. The first description is patently misleading by omission. The Order omits that the LUPA Petition that launched this action also describes Plexus and Spice "applicants and property owners". CP 1-3. The Order also omits entirely the facts in the record which show the evolving ownership of the Subject Property as presented in summary form Chart of Property Ownership, CP 4758-4760. Most notably, the Order completely omits reference to two quit claims deeds in 2007 and 2009 which together gave Mr Spice 100% of the Subject Property Ownership ***prior*** to Ms. Mathew's passing. CP 4879-4880. These are the same quit claims deeds relied on by this Court of Appeals unpublished case of *Ted Spice v. Donna E. Dubois as personal representative for the Estate of Doris E. Mathews, deceased*, No. 44101-2-II, March 1, 2016, appeal of the lawsuit between Plaintiff Spice and the Estate of Doris Mathews in Pierce County Cause No. 10-2-11622-8 (referred to in the LUPA matter by Petitioners as the "Probate Case"). This Appeals Court sets facts, pertinent to management, ownership and control of the property subject of this lawsuit as well. [11003 58th St. Ct. E., Puyallup] ("LUPA Subject Property")], and cites to Spice's durable power of attorney to act for Ms. Mathews since 2004, the 2004 Plexus Operating

Agreement, and most significantly, that between 2007 and 2009, Mathews granted Spice quitclaim deeds to the subject property."[45]

The CR 11 Order's omissions of these same facts are factually and legally significant. Since Ms. Mathews deeded Spice 100% of the subject property prior to her death, Mr Spice had an absolute right to pursue the LUPA action. Ms. Mathews was not an indispensable party, as her interest in the property was deeded away[46]. It was only after the October 2012 Probate Order that the Estate of Ms. Mathews was pronounced to once again have an interest in the subject property – three years after Ms. Mathews passing.[47] Yet, the CR 11 argument is based on attorney fees and costs incurred after December 9, 2009, the date of Ms. Mathew's passing and is thus factually incorrect (""...sanctions in the amount of $45,000 are fair, reasonable, necessary and directly related to defense of Petitioners' claims and attorney Lake's actions *after the death of*

[45] "In February 2004, Spice obtained durable power of attorney over Mathews. In April 2004, Spice and Mathews together formed a real estate development company called Plexus Investments, LLC (Plexus). Spice held a 51 percent interest in Plexus, and Mathews held a 49 percent interest. Mathews and Spice signed a Plexus Operating Agreement governing the company. This operating agreement also included an attorney fee provision for reasonable attorney fees to the substantially prevailing party in any dispute "arising out of the terms of this Agreement or the Members' relationship or a suit or action permitted herein." Ex. 6 at 19. Several property transfers are at issue in this case. Between 2007 and 2009, Mathews granted Spice quitclaim deeds to 11003 58th St. Ct. E and 11319 58th St. Ct. E...."These same facts were presented to the Court.

[46] Petitioners do not by this statement waiver from their long held position that all owners of a property interest pursuant to RCW 64.40 are entitled to damages.

[47] That Order was also appealed, and only recently was affirmed by the Appeals Court – less than a month ago, contributing to Petitioners' description of the ownership interest here as "continually evolving".

Plaintiff Doris Mathews" and "...the $45,000 in awarded sanctions is appropriate to offset some of the attorneys' fees and *costs expended since Ms. Mathews' death*, is an appropriate deterrent and sanction..")

3. Order Erred In Claiming that Petitioners' Counsel Failed To Disclose Why Pleadings were Filed post-Ms. Matthews's death.

The CR 11 Order makes the repeated assertion to the effect that Petitioners' counsel 'has never offered explanation for her failure to advise the Court or defendants of the death of her client, Ms. Mathews.' This is untrue and unfair. While the Court may not agree with Petitioner Counsel's explanation, Petitioners' Legal Counsel has consistently explained why the duty for continued representation of the remaining Petitioners remained:

> Here, Spice and Plexus position was always that they had claims independent from Ms Mathews. Those claims were well grounded in detailed facts and law. That this Court happened to disagree in no way diminishes that there were legitimate arguments on both sides. Ultimately the Appeals Court will decide, but if the Appeals Court disagrees with the Trial Court's ruling that does not make the Trial Judge's ruling frivolous or unfounded, any more than losing before a Trial Judge makes the lawyers' arguments frivolous or unfounded. From the outset of this case, Petitioners have presented both facts and law in support of their position that all three Petitioners have standing and each were injured pursuant to Chapter 64.40 RCW by Puyallup's delay and refusal to process their application for water service, which would have allowed re-development of property, for which Spice and Plexus both had a property interest or right.

CP 4723-4754 at 4725.

> Our actions were never baseless. They were not baseless in fact and they were not baseless in law.
> We have consistently, from the very beginning of this lawsuit, held

that each and every one of the three plaintiffs each had an independent duty, independent claim, for damages against the City of Puyallup. And they were all independent from each other.

We didn't just rely on facts or belief, we relied on evidence. And, your Honor, I'm going to hand up Appendix 1 because we acknowledge -- this is attached, but highlighted -- we acknowledge that property in interest here evolved a lot over time. That's why we wanted to make it crystal clear in this charter property ownership that at all times relevant to this case, Spice, Plexus, Mathews, or two or three or all of them, had an interest in the subject property. And we didn't, again, just rely on our authority or belief, we based it upon Power of Attorney granted to Spice, we based it on operating agreement of the LLC, we based it on two quit claim deeds that transferred 100 percent of the subject property to Spice.

...So our facts have always been true that every plaintiff was an owner of a property interest.

Our arguments were always grounded in law. And the law is 64.40 which, again, missing from the City's case. The clear wording of 64.40, upon which all plaintiffs' and each and every plaintiffs' damages was based, says an owner of a property interest may maintain damages. There is no post LUPA case, there's no case law that rebuts that, and no post LUPA case, in other words, younger than 25 years, that goes contrary to the position that we held.

Now, we know that you ruled against us and accepted the City's old law, and that's the law of the case. But in order for you to find CR 11 damages, you have to find that we had no good faith basis in fact or law to bring the actions that we did on behalf of Plexus and Spice.

CP 5164-5200 *Transcript of September 25, 2015 h*earing, at 54:5-16.

4. Petitioners' Noting The Passing Of Ms. Mathews On The Records Was Timely & Complied with CR 25.

This action originated as Petitioners' suit for the *affirmative* relief of (1) achieving water service from Puyallup to develop property and (2) damages to be made whole by Puyallup's failure to act and denial of water. The outcome of the suit was to ***benefit*** the Petitioners, which benefit would accrue to the Estate upon Ms. Mathews' passing. Only in

the waning steps of this case before the Trial Court did the possibility of an outcome monetarily adverse to any Plaintiff arise. The Trial Court had granted Summary Judgment June 21, 2013. CP 1141-1145. Petitioners moved to Reconsider. CP 1146-1243. Puyallup moved for Attorney's Fees & Costs simultaneous to Plaintiff's Reconsideration Motion. The Trial Court denied Reconsideration CP 1365, which opened the door for the attorney fees and costs. The very next pleading Petitioners filed was the October 10, 2013 Notice of Appeal – which noted the passing of Plaintiff Mathews on the Record. CP 1369-1381. Puyallup has used critical words to characterize the pleading as a footnote but they notable do NOT claim it wasn't legible. Puyallup in fact admits seeing it **later** when they reviewed the record, a review which should have occurred **contemporaneously** with Petitioners' filing of it.

Summary Judgment dismissing all Petitioners' RCW 64.40 & other actions	June 21, 2013
Petitioners File Reconsideration of Dismissal	July 1, 2013
Puyallup Files Motion for Attorney's Fees	July 1, 2013
Order Denying Reconsideration	September 10, 2014
Appeal filed by remaining Petitioners (Spice & Plexus) appeal; Petitioners Note on the record the passing of Mathews	**October 10, 2013**
Order Entered Granting Fees and Costs	December 13, 2014

The inclusion of Ms. Mathews' name in the heading prior to filing the appeal cannot be construed as an act of bad faith, as Puyallup argues. An act of bad faith, for the purpose of CR 11 sanctions, has been described as

filings made for the purpose "harassment." See, *In re Recall of Pearsall-Stipek*, 141 Wash.2d 756, 10 P.3d 1034 (2000). The captions in the heading were submitted for the purpose of maintaining continuity with the previously filed pleadings. Here, the pleadings filed after Ms. Mathews' death were made for the genuine purpose of making Mr. Spice's and the LLC's injuries whole. Further, as soon as the litigation turned from seeking ***affirmative relief*** for Petitioners to the potential of an ***adverse*** monetary ruling as to Petitioners, Petitioners noted on the record the passing of one of the three Petitioners. Puyallup has shown no duty which Petitioners breached. CR 11 was not warranted and was error.

5. Puyallup Fails to Provide the Legal Basis Upon Which Petitioners Should be Sanctioned.

Puyallup argues that Petitioners committed a highly sanctionable offense based a duty that simply doesn't exist as to Petitioners:

> The basis of this fee request is their failure to advise the Court or the City of the fact that Petitioner/Plaintiff Doris E. Mathews died in December 21 2009, and for failing to take appropriate action in this case, such as a motion for substitution, in response to her death,

CP 3299. Puyallup is wrong. Further, **Puyallup's attorneys admitted that they found no law which supported their CR 11 Motion**. CP 5259-5260.

> **There just isn't a case we could find anywhere after lengthy research to say, gee, this is a Rule 11 violation** when your client dies and three and four years later you continue to litigate on behalf of the client, have hearings, file briefs, file motions, file declarations with her name on the caption, allow orders to be entered, and have a judgment

> entered against a dead person, and then disclaim any responsibility for any of that. I mean, it's such a bizarre set of facts here that the courts I guess haven't had to deal with that before.

And - Puyallup's continual argument embedded in their CR 11 Motion that Petitioners somehow acted badly or inappropriately is directly contrary to Washington State probate law on claims against estates (Chapter 11.40 RCW). Puyallup argues that the Petitioners in this case had a duty to substitute the Estate after Ms. Mathews' passing. However, RCW 11.40.110[48] cited by both Puyallup and the Estate of Mathews, provides that a Plaintiff must move to substitute the personal representative **only** when the decedent is the ***defendant*** in an action. Here, Ms. Mathews was a co-plaintiff, and other co-Petitioners had no duty to substitute Ms. Mathews' personal representative. They reasonably believed they could proceed in their own right. The award of prevailing party attorney fees is a temporary adverse ruling expected to be addressed on appeal, but in no way converts Petitioners' status as "Petitioners" (for which no duty to notify the PR exists) to that of deceased defendant (where duty to notify the PR exists). Once it is properly understood that a co-plaintiff has no duty under either CR 25 or RCW 11.40.110 to substitute the estate, then the entire basis for

[48] If an action is pending against the decedent at the time of the decedent's death, **the plaintiff shall**, within four months after appointment of the personal representative, serve on the personal representative a petition to have the personal representative substituted as **defendant** in the action. Upon hearing on the petition, the personal representative shall be substituted, unless, at or before the hearing, the claim of the plaintiff, together with costs, is allowed.

Puyallup's unfounded CR 11 sanctions evaporates. Any duty to suggest the death was performed.

6. Law Does Not Support Court's CR 11 Order

The foundation for Puyallup's CR 11 Motion hinges completely on the legal issue of whether Ms. Mathews is an indispensable party. Puyallup argues that Ms. Mathews was an indispensable party and based on that issue alone, all pleadings filed after her death were "baseless". This Court can only find a CR 11 violation if it finds that Petitioners' pleadings filed since Ms. Mathew's passing were "baseless" and "not well grounded in fact or warranted by law." *Lee v. Kennard*, 176 Wn. App. 678, 691, 310 P.3d 845 (2013). For purposes of CR 11, a filing is baseless if not grounded in fact, or nor warranted by existing law or a good faith basis to alter existing law. *Id.* CR 11 sanctions are warranted only "when it is patently clear that a claim has absolutely no chance of success." *In re Cooke,* 93 Wn App. 526, 529, 969 P.2d 127 (1999). That is far from the situation here. Petitioners presented facts and law to show that each of the three Petitioners had their own right of action to pursue damages. In that case, the passing of one of the three Petitioners did not bar the case continuing forward. This Court disagreed with Petitioners; nonetheless Petitioners' position is not "baseless", as is required to support CR 11 sanctions. *Bryant v. Joseph Tree, Inc.* 119 Wn.2d 210, 829P.2d 1099

(1992). "The fact that a complaint [or position or motion or opposition to a motion] does not prevail on its merits is by no means dispositive of the question of CR 11sanctions". *Id.* Since prior to the LUPA action, the interests in the Subject Property admittedly have evolved. Here, Petitioners did not offer any inaccurate information nor did they somehow attempt to mislead the Respondents or the Court. Instead, significantly, at all times Petitioners presented factual and legal support that Plexus LLC and or Ted Spice or both had ownership and management authority, including the authority to develop the property, upon which the water rights from Puyallup were needed, and or that these Petitioners held "an interest" in the Subject Property sufficient to maintain the suit. See Property of Ownership Chart CP 4758-476. While the passing of one Plaintiff terminated the attorney client relationship as to that deceased party, Plaintiff counsels' duty remained and still remains to the remaining Petitioners. No CR 11 sanctions are warranted.

7. Sanctions Under CR 11 Are Not Appropriate/ Puyallup Has Not Met Its Burden.

The burden is on **the movant** to justify the request for CR 11 sanctions. *Biggs v. Vail*, 124 Wn.2d at 202. Puyallup failed to do so. An order imposing CR 11 sanctions must (1) specify the offending conduct, (2) explain the basis for the sanction imposed, and (3) quantify any amounts awarded with reasonable precision. *Biggs*, 124 Wn.2d at 193.

Puyallup presented no precision on the connection between the fees incurred and the alleged sanctionable conduct and no linkage between the time expended and the award of $45,000. The fee award is error.

8. No "offending Conduct" Exists as Notice of Mathew's Death Was Not Critical to the Application of the Law in This Litigation.

Puyallup has not met its burden, as it cites no law regarding Petitioners' claimed "offending conduct". Puyallup argues that pleadings filed by Plaintiff and Counsels, *from the date of Ms. Mathew's death,* were "not well-grounded in fact, or warranted by law" because Ms. Mathews was the "primary litigant," and since the date of her passing, Petitioners and Counsel had no authority to continue this litigation. Yet, Puyallup fails to cite any Washington authority which stands for the proposition that when a Limited Liability Company and its members are involved in litigation, and when one member dies, the entire litigation must cease.

To impose sanctions for filing a baseless complaint, the trial court must make findings specifying the actionable conduct. *Stiles v. Kearney*, 168 Wash.App. 250, 277 P.3d 9 (2012), review denied 175 Wash.2d 1016, 287 P.3d 11. In order to impose sanctions for filing a complaint that lacks a factual or legal basis, the court must make explicit findings as to which pleadings violated the Civil Rules and as to how such pleadings constituted a violation; the court must also specify the sanctionable

conduct in its order. *North Coast Elec. Co. v. Selig,* 136 Wash.App. 636, 151 P.3d 211 (2007); *State ex rel. Quick-Ruben v. Verharen,* 136 Wash.2d 888, 969 P.2d 64(1998); *McNeil v. Powers,* 123 Wash.App. 577, 97 P.3d 760 (2004), as amended. The Court's CR 11 findings here are not supported by the record and are error.

9. Puyallup has not Shown Petitioners Pleadings Were "Baseless".

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Biggs v. Vail,* 124 Wn.2d 193, 197, 876 P.2d 448 (1994). CR 11 requires consideration of both its intent to deter baseless legal claims, as well as the potential chilling effect sanctions may have on meritorious claims. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992). A trial court may not impose CR 11 sanctions for a "baseless" filing "unless it also finds that the attorney who signed and filed the [pleading, motion, or legal memorandum] failed to conduct a reasonable inquiry into the factual and legal basis of the claim." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220. Courts employ an objective standard in evaluating an attorney's conduct and test the appropriate level of pre-filing investigation by inquiring what was reasonable to believe at the time the pleading was filed. *Biggs*, 124 Wn.2d at 197; see *Miller v. Badgley*, 51 Wn. App. 285, 299-300, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988). Finally, to impose sanctions for filing a baseless complaint, the

trial court must make findings specifying the actionable conduct. *N. Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 649, 151 P.3d 211 (2007). Here this Court disagreed with the ultimate merits, but it cannot be disputed that Plaintiff presented facts and law in support Petitioners' position that at all times relevant.

10. Petitioners Cited Legal Authority Upon Which Remaining Petitioners Relied for Continuing to Pursue the lawsuit.

Petitioners consistently maintained that both the facts and the law supported the remaining Petitioners moving forward with this suit, including RCW 25.15.295: regarding the authority of LLC: "To preserve the limited liability company's business or property as an ongoing concern to prosecute and defend actions and proceedings whether civil, criminal, or administrative." CP b5181, 5181-3, and 5187.Based on the Operating Agreement (unaltered by the probate case), the promissory note, and the property interests awarded to Mr. Spice, it is clear that the law supported an argument that Plexus / Mr. Spice had authority to pursue this litigation after Ms. Mathews had passed. That is all this is required to defeat a CR 11 Motion. As such, each and every pleading and memorandum signed by counsel were signed good faith and under the reasonable belief that such action was permitted by the aforementioned doctrines and law which granted such authority to Mr. Spice, and preserved the rights of Mr. Spice and the LLC to continue to prosecute a claim for damages. No Plaintiff

pursued this litigation for any improper purpose, but acted in the interest of developing the Subject Property pursuant to duty and authority as a manager of the Plexus's real property assets and to recoup losses caused by the acts and omissions previously documented in this matter.

11. Petitioners Relied on Court Rules and Law To Determine Status of Suit Upon Death of One of Multiple Petitioners.

a. Petitioners Relied on Civil Rule & Statute As to The Status Of Ms. Mathews/Her Estate In This Case.

Petitioners relied on CR 25, the controlling Washington law which governs situations when one party dies.[49] Petitioners read CR 25 as placing ***no affirmative duty*** on any party to move to substitute the Estate as a party. "Any party" may move to substitute. Plexus complied with CR 25(a)(2) to the extent that any duty exists as to them. This Notice on the record preceded entry of the Order awarding Attorney Fees. Most significantly, CR 25 goes on to provide that even when a deceased party is dismissed out, "the action shall proceed in favor of or against the

---

[49] (b) Death.
(1) Procedure. **If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.** The motion for substitution may be made **by the successors or representatives of the deceased party** or by any party and, together with the notice of hearing, shall be served on the parties as provided by rule 5 for service of notices, and upon persons not parties in the manner provided by statute or by rule for the service of a summons. **If substitution is not made within the time authorized by law, the action may be dismissed as to the deceased party.**
(2) Partial Abatement. **In the event of the death of one or more of the plaintiffs** or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, **the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.**

surviving parties."

b. Petitioners Presented Legal Authority that Lacking Action to Dismiss by the Estate or Court, the Action Survives.

Under Washington's general survival statute, "all causes of action ... shall survive to the personal representative [ ]" of the estate. RCW 4.20.046.[50] The general survival statute does not create new causes of action but preserves all causes of action that a decedent could have brought had he or she survived. *Vernon v. Aacres Allvest, LLC* (2014) 2014 WL 4358463. *Estate of Otani v. Broudy,* 151 Wash.2d 750, 755, 92 P.3d 192 (2004). Thus, the only prerequisite to maintaining a survival action is that the decedent could have maintained the action *had he lived. Moen v. Hanson,* 85 Wash.2d 597, 599, 537 P.2d 266 (1975).[51]

---

[50] [a]ll causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section.

[51] Here, the action of Ms Mathews survives and was not extinguished by her passing. **Significantly, NO party has moved to substitute or dismiss the Estate pursuant to CR 25, even as of today.** Puyallup did **not** moved to substitute or dismiss the Estate. Puyallup sought and received a wholly different relief – that of dismissing the case entirely, as to all Petitioners. The Estate also has **not** moved to substitute or dismiss the Estate. Ms. Mathews' heirs still have **not** moved to dismiss the Estate or withdraw from the case for over four years, despite the Personal Representative (PR) Ms DuBois's pending knowledge of the LUPA action and involvement in at least three other litigations[51] with Mr. Spice.[51] Notably, Ms. DuBois, the PR of the Estate lacks the authority to act for the Estate, without Court approval. Ms. Dubois' powers of non-intervention were removed by Court Order in March of 2015. Thus Ms. Dubois lacks authority to make any decisions regarding the property subject of this lawsuit and instead must seek Court ruling. CP 4885-4887.The position of Ms. Dubois personally or as PR of the Estate , or the statements by Ms. Dubois' personal attorney are immaterial and irrelevant. First. Ms. Dubois, personally, is not connected with this lawsuit in any way.

12. Contrary to CR 11, Puyallup's requested sanction in excess of $300,000 Is Not Quantified with Precision nor is the Least Severe

Any amounts awarded pursuant to CR 11 must be quantified with reasonable precision (*Biggs v. Vail*, 124 Wn.2d at 193). High or excessive dollar awards are discouraged given the requirement that the least severe sanction be imposed. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 210. The trial court is directed to impose "the least severe sanction necessary to carry out the primary purpose of CR 11. *Id.*; (see also *Miller v. Badgley*, 51 Wn. App. 285, 753 P.2d 530 (1988), (holding that, although CR 11 specifically mentions monetary sanctions, this does not preclude the court from imposing some other type of remedy or combination of remedies)).

The amount imposed ($45,000) against counsel is all the more disproportionate since the Trial court was aware that that Legal Counsel had received no compensation since 2008 - for the last eight years of this complex litigation.[52] Puyallup's Motion makes no attempt whatsoever at a

---

This Court asked the attorneys for Donna DuBois whether the Estate wanted to participate in the litigation. Personal Counsel for Ms. DuBois answered: "I can state with absolute confidence and certainty that Ms. DuBois is vehemently opposed to participating in this case." Transcript of June 5 hearing at10:5-7. CP 5174. Second, the June 5, 2015 statements by the attorney for Ms. Dubois in her capacity as PR for the Estate of Doris Mathew also are irrelevant, as Ms. Dubois' powers of non-intervention were removed by Court Order in March of 2015. CP 4885-4887.

[52] MS LAKE: We make mention in our brief that **since 2008, this counsel, anyway, has received absolutely no fees from plaintiffs.** And I say that not to -- for no other purpose than to say we're not churning up stuff here for the fun of it. Your Honor may remember a district court case where a property owner was prosecuted criminally, and I took that case. And, again, that was one where there wasn't any fee. I don't take easy

request for the "least severe sanctions" and makes no attempt to quantify the sums attributable to the alleged conduct with any type of precision. Instead, Puyallup simply asked for everything. If a trial court grants fees under Rule 11, it must limit those fees to the amounts reasonably expended in responding to the sanctionable filings. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wash.App. 409, 157 P.3d 431 (2007). "....exceeding these fees and costs transforms motions for sanctions into a counterclaim without any of the procedures, burden of proof, or defenses of filing a counterclaim." *Saldivar v. Momah*, 145 Wash.App. 365, 186 P.3d 1117 (2008), as amended, review denied 165 Wash.2d 1049, 208 P.3d 555.

13. All Doubts Must be Resolved In Favor of Non Moving Party.

Rule 11 is directed to remedy situations where it is patently clear that a claim has absolutely no chance of success... **and any and all doubts must be resolved in favor of the signer.** *Saldivar v. Momah*, 145 Wash.App. 365, 186 P.3d 1117 (2008), as amended, review denied 165 Wash.2d 1049, 208 P.3d 555. A "frivolous appeal," for which sanctions may be imposed, is one which, **when all doubts are resolved in favor of the appellant**, is so devoid of merit that there is no chance of reversal. *In*

---

cases, but I take cases that have a good faith basis and which are justified in the law, and this case demanded justice then, it demands justice now.
TR 9/25/15 @ 48:4-8. CP 5295.

re Guardianship of Cobb, 172 Wash.App. 393, 292 P.3d 772 (2012), review denied 177 Wash.2d 1017, 304 P.3d 114.

14. Court Should Reverse CR 11 Ruling Based on Chilling Effect.

Since CR 11 sanctions "have a potential chilling effect, a trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999). The intent of Rule 11 is not to chill an attorney's enthusiasm or creativity in pursuing actual or legal theories because, if excessive use of sanctions chilled vigorous advocacy, wrongs would be uncompensated; specifically, attorneys, because of fear of sanctions, might turn down cases on behalf of uncharismatic individuals seeking redress in the courts. *Saldivar v. Momah,* 145 Wash.App. 365, 186 P.3d 1117 (2008), as amended, review denied 165 Wash.2d 1049, 208 P.3d 555.

> CR 11 says that you need to think carefully about imposing CR 11 for the chilling effect it has. **You know, there is a saying that you can't fight City Hall. And here where private citizens who are seeking no more than to get water service from a city who denied them being able to get it, can't come and seek relief for fear that the case is going to be turned against them and have this huge amount of sanctions imposed upon them, then City Hall will always win.** This is the very chilling effect that your Honor needs to take into effect.

CP 5302. Transcript of September 25, 2015 hearing, at 54:5-16. Because Rule 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. *Building Industry Ass'n of Washington v.*

remedies: primary jurisdiction. Most Cited Cases
(Formerly 414k562)

Exhaustion of administrative remedies is a prerequisite to obtaining a decision that qualifies as a land use decision subject to judicial review under Land Use Petition Act (LUPA). West's RCWA 36.70C.120.

[4] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases

The exhaustion of remedies doctrine, as a prerequisite for obtaining judicial review of an administrative decision, applies in cases where a claim is originally cognizable by an agency which has clearly defined mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought.

[5] Water Law 405 2037

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)12 Supply to Private Consumers
405k2037 k. Right and duty to supply in general. Most Cited Cases
(Formerly 405k201)

Water Law 405 2117

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2117 k. Conditions or exactions incident to connecting to public system. Most Cited Cases
(Formerly 405k201)

County hearing examiner had authority, under county code, to require city to provide continued water service and issue water service availability letter to property owner, whose property was outside city limits but within city's exclusive water service provider area, without requiring owner to sign a pre-annexation agreement to use city water; county code allowed examiner to impose reasonable conditions necessary to make a project in county compatible with its environment, and allowed water customers and potential water customers to challenge the reasonableness of pre-annexation requirements. West's RCWA 36.70.970(1).

[6] Administrative Law and Procedure 15A 677

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak677 k. Assignments of error and briefs. Most Cited Cases

In an administrative appeal, an issue raised and argued for the first time in a reply brief is too late to warrant consideration by the appellate court.

**535 Kevin John Yamamoto, City of Puyallup. Puyallup, WA, for Appellant.

David Brian St. Pierre, Pierce County Office of Prosecuting Attorney—Civil, Tacoma, WA, J. Richard Aramburu, Aramburu & Eustis LLP, Seattle, WA, for Respondents.

BRIDGEWATER, P.J.

*838 ¶ 1 The city of Puyallup (City) appeals the

Pierce County Superior Court's denial of its motion to dismiss Michael Stanzel's land-use petition for failure to first exhaust his administrative remedies. The City further challenges the Pierce County Superior Court's determination that the Pierce County hearing examiner had authority to order the City to provide water service and a water service availability letter to Stanzel. We affirm.

FACTS

¶ 2 Stanzel owns real property at 6224 114th Avenue Court East in Pierce County, Washington, that he calls the "church property." VRP (June 20, 2007) at 31. The church property contains a church building, paintball fields, and a shed; it is zoned by the County as mixed use development or M.U.D. VRP (June 20, 2007) at 32, 56. Stanzel receives water service for the church property from the City because it sits within the City's water distribution zone although it is outside the City's corporate limits. The City classifies the service it provides to Stanzel as residential water service.

¶ 3 Stanzel sought to bring the church building up to code so that he could use it for church services. He also intended to add a game room and to add restrooms to the facilities.[FN1] In addition, Stanzel sought to upgrade the drain field on the property. Stanzel hired an engineer and submitted designs to the Pierce County Department of Health. Pierce County did not act on the submitted designs and related permit requests because Stanzel failed to provide Pierce County with a water availability letter from the City.

> FN1. Stanzel testified that his business is seasonal and that he sought the upgrades primarily so he could have an indoor building during the winter where people could congregate for birthday parties and to eat hamburgers. He needed the commercial water supply to support the increased bathrooms on the property.

¶ 4 Stanzel went to the City's utilities department and asked for a commercial water availability letter. Stanzel brought with him a June 25, 2004 letter, describing his *839 request. He delivered the letter along with the County's water availability form and presented it to city employee Colleen Harris. Harris informed Stanzel that the City was no longer providing water availability letters for property outside its city limits. Harris asked Stanzel what he planned to do with the property and he told her that it was really none of her business. Harris informed Stanzel that if he changed the property use from residential to commercial, the City would cut off his water service. Harris attempted to slide the letter back to Stanzel, stating that she would not accept it. Stanzel left the letter sitting on the counter in front of Harris.

¶ 5 On January 6, Stanzel returned to the utilities department and asked the City to stamp another letter because the City had not responded to his first letter. In response, Harris mailed Stanzel a copy of the Puyallup Municipal Code. Stanzel noted that the City had changed its code requirements, which now stated that the City would not provide fire flow or water availability letters unless there was an active annexation in the area and the property owner agreed to annexation. Stanzel testified that the property owners in the area, including the church property, had addressed the issue of annexation to the City in a recent election, ultimately deciding against annexation. Stanzel did not want to annex to the City.

¶ 6 Stanzel investigated other water service providers, including a water utility in nearby Edgewood. Edgewood informed Stanzel that it did not have distribution lines available to Stanzel's property and that all water service agreements are filed with Pierce County per Washington code. Stanzel considered buying a fire flow tank for the church property, but he quickly discovered that a 90,000 gallon tank would cost over $80,000. In contrast, Stanzel's water costs **536 through the City ranged between $30 and $50

per month.

¶ 7 On August 9, Stanzel wrote another letter to the City again requesting water service, this time directed to Tom Heinecke. Again, the City did not respond.

*840 ¶ 8 Stanzel brought a motion before the Pierce County hearing examiner as a part of a separate case involving one of Stanzel's neighboring properties, a company named Plexus Investments, LLC, seeking an order that would compel the City to provide him with commercial water service and an availability letter. Over the City's jurisdictional objections, the hearing examiner heard Stanzel's case while acknowledging that Stanzel did not go through the City's normal dispute resolution process. The hearing examiner based the decision to hear Stanzel's motion on the hearing examiner's decision in the Plexus hearing, where the hearing examiner ruled that the Pierce County Code allowed property owners outside of the city limits to go directly to the hearing examiner to resolve disputes.

¶ 9 The hearing examiner heard Stanzel's motion to compel, ultimately determining that the City's preannexation requirement was unreasonable but denying Stanzel's request because the hearing examiner lacked authority to compel the City to provide service. The hearing examiner noted that if he had authority, he would compel the City to provide service to Stanzel under these specific facts. But, the hearing examiner allowed Stanzel to seek alternative sources for water and/or to be removed from the City's service area if desired.

¶ 10 On August 17, 2007, Stanzel filed a petition for judicial review under the Land Use Petition Act (LUPA), chapter 36.70C RCW, in superior court, requesting that the trial court direct the hearing examiner to compel the City to provide his requested water service and related availability letter. The City moved to dismiss Stanzel's petition, arguing that he failed to exhaust his administrative remedies and therefore lacked standing. Specifically, the City claimed that Stanzel failed to submit an application to the City, failed to pay the City's application fee, failed to submit to a review and approval process before the city council, and failed to seek redress from the City's hearing examiner. The trial court denied the City's motion to dismiss. The trial court reasoned that the Puyallup Municipal Code should be *841 strictly construed and accordingly, applied only to new connections or extensions. Otherwise, the trial court reasoned, Stanzel would have to start from scratch with the City.

¶ 11 Ultimately, the trial court granted Stanzel's petition and reversed the hearing examiner, ruling that the hearing examiner did have statutory authority to compel the City to provide water service to Stanzel's church property based on the facts of this case. The trial court conditioned its decision on Stanzel meeting the "usual permitting and informational requirements of any applicant for comparable water service within the City." CP at 119. The trial court also required that Stanzel cooperate and supply detailed plans for his intended project to the City. The City appeals.

ANALYSIS

I. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

[1][2][3] ¶ 12 The City contends that the trial court erred when it denied the City's motion to dismiss Stanzel's LUPA petition for failure to exhaust administrative remedies. Under LUPA, we stand " 'in the shoes of the superior court' " and limit our review to the hearing examiner's record. *Abbey Rd Group, LLC v. City of Bonney Lake*, 141 Wash.App. 184, 192, 167 P.3d 1213 (2007) (quoting *Pavlina v. City of Vancouver*, 122 Wash.App. 520, 525, 94 P.3d 366 (2004)), *review granted*, 163 Wash.2d 1045, 187 P.3d 750 (2008). Exhaustion of administrative remedies is a prerequisite to obtaining a decision that qualifies as a decision reviewable under LUPA. *Ward v. Bd of*

County Comm'rs, Skagit County, 86 Wash.App. 266, 271, 936 P.2d 42 (1997).

¶ 13 According to the City, Stanzel failed to follow several of its application procedures for water and sewer connections or extensions outside its city limits. First, it contends that Stanzel failed to submit an application**537 to the City for water service. The Puyallup Municipal Code (PMC) provides:

> *842 (1) Each applicant for service shall be required to sign, on a form provided by the city, an application which shall set forth:
>
> (a) Date of application;
>
> (b) Name and social security number of applicant;
>
> (c) Location of premises to be served;
>
> (d) Size and location of water service;
>
> (e) Date applicant will be ready for service;
>
> (f) Whether the premises have been heretofore supplied with water by the city or its predecessors;
>
> (g) Purposes for which water service is to be used, including the number of dwelling units, if any, being served;
>
> (h) Address to which bills are to be mailed or delivered;
>
> (i) Whether the applicant is the owner or tenant of, or agent for the premises and if tenant, the name of the property owner;
>
> (j) Such information as the city may reasonably require.
>
> PMC 14.02.150.

¶ 14 The administrative record here contains the June 25, 2004 letter that Stanzel left on the counter at the City utilities office. The letter indicates that it was delivered along with Pierce County's required water availability form. The June 25, 2004 letter is not signed, is not a form the City provided, does not contain Stanzel's social security number, does not include the size and location of water service, does not inform the City as to when Stanzel would be ready for such service, does not include the purpose for which Stanzel would use the water, does not include the number of buildings to be served, and does not indicate the address to which bills should be mailed or delivered.

¶ 15 The record also contains Stanzel's follow-up letter, dated January 6, 2005, for which the City asserts similar deficiencies. The January 6, 2005 letter is not a form the City provided, it does not contain Stanzel's social security number, it lacks the size and location of water service, it does not indicate the purpose for which Stanzel would use the water, it does not contain the number of dwellings to be *843 served, and it does not indicate where the City should mail or deliver the bills.

¶ 16 The City states that Stanzel did not otherwise supply the information that PMC 14.02.150(1) required, especially information concerning the purpose of the requested water. It cites to Stanzel's interaction with Harris, where he responded to Harris's inquiry about the change of use on his property by saying, "[i]t was really none of their business, [he] just needed a commercial Water Availability Letter." VRP (June 20, 2007) at 43.

¶ 17 The City next faults Stanzel for failing to pay the application fee and for failing to participate in a pre-application conference with the City. Former

PMC 14.22.011 (2004) provides:

> **14.22.011 Pre-application conference and application fee.**
>
> Prior to the acceptance of an application by the city, applicants shall participate in a pre-application conference for the purpose of establishing the application fee. The purpose of the application fee is to ensure the recovery of city costs and expenses associated with the review of the application and drafting or preparing any utility extension agreement, including but not limited to actual costs of city staff time and resources as well as any outside consultation expenses which the city reasonably determines are necessary to adequately review, prepare and analyze the application and any proposed extension agreement. The application fee shall be a minimum of $2,500 with additional charges due depending upon estimated reasonable city costs and expenditures in review of the application. Disputes in the fee amount charged by the city shall be resolved by appeal to the hearing examiner. All applicants shall deposit the application fee with the city before the application will be processed.

Former PMC 14.22.011 [FN2]; Administrative Record (AR) at 79–80. It is undisputed that **538 Stanzel did not participate in such a pre-application conference and did not pay any such application fee.

FN2. The City modified its code in 2008. *See* Ordinance 2913 § 2 (2008).

*844 ¶ 18 Next, the City faults Stanzel for failing to present an application for review to the city council and for failing to obtain the council's approval for commercial water service. Former PMC 14.22.010 (2004) provides:

> **14.22.010 City council approval required.**
>
> It shall be the policy of the city of Puyallup that all applicants for the extension/connection of water or sewer service outside the corporate limits of the city of Puyallup shall be subject to review and require approval by the city council prior to the issuance of a permit for the extension/connection of water or sewer service ... Applicants must demonstrate that they have initiated or are part of an ongoing annexation process which would bring the property that is subject to a utility extension/connection application into the Puyallup city limits. In its review, the city council may consider the following: impact on the water or sewer system usage; annexation considerations; compliance with the City of Puyallup's comprehensive plan and the City of Puyallup development standards; and any other considerations deemed appropriate by the city council.... The decision of the city council shall be a discretionary, legislative act. If approval is granted by the city council, it shall be in the form of a utility extension agreement approved by the city attorney.

Former PMC 14.22.010 [FN3]; AR at 79. Again, it is undisputed that Stanzel did not meet with the city council, and he certainly did not receive the council's approval.

FN3. The City modified its code in 2008. *See* Ordinance 2913 § 1 (2008).

¶ 19 Finally, the City faults Stanzel for failing to seek a hearing before the City's own hearing examiner. Specifically, the City contends that the city council was the only entity that had authority to approve or deny an extension or connection of water service to Stanzel. If, it argues, a city official denied service, the PMC provides a remedy, namely, an appeal of that denial to the City's hearing examiner. PMC 2.54.070 provides:

> **2.54.070 Consideration of land use regulatory**

cases.

The following cases shall be within the jurisdiction of the examiner under the terms and procedures of this chapter:

***845** ...

(13) Appeals of administrative decisions.

PMC 2.54.070. It is undisputed that Stanzel did not appeal the City's denial, if there was one, to the City's hearing examiner.

¶ 20 Essentially, the City's argument is that rather than using the City's resources and remedies, Stanzel ignored the City's procedures, opting instead to appeal directly to the County in hopes that the County would compel the City to provide Stanzel with a water availability letter. Stanzel responds first by addressing whether he fits into the category of property owners subject to the City's application process and then addresses his compliance with exhausting his remedies under the Pierce County Code (PCC). He then contends that the exhaustion of remedies requirement should not apply to him because, even if he had followed the City's process, to do so would prove futile.

¶ 21 Stanzel contends that he falls outside of the City's application requirements because he is not seeking new or extended water service and is, instead, already connected. Specifically, Stanzel contends that PMC 14.22.010 applies only to "all applicants for the extension/connection of water or sewer service outside the corporate limits of the city." PMC 14.22.010. The hearing examiner concluded that Stanzel was already an existing customer and that he was not seeking an extension. We agree.

¶ 22 As additional support for his contention, Stanzel asserts that he was not required to follow the City's application process because he did not intend to make a "material change" in the property's use. Br. of Resp't (Stanzel) at 29. PMC 14.02.150(3) provides:

(3) A customer making any material change in the size, character or extent of the equipment or operations for which the city's service is utilized shall immediately file a new application for additional service. ****539** A change in a customer's service which requires the installation of a different or additional meter, when made at the customer's request, shall be made by the city at the customer's expense.

PMC 14.02.150(3).

***846** ¶ 23 Here, the hearing examiner found that Stanzel's intended use for the church property would involve "very limited improvement on the site." AR at 10. Further, the hearing examiner found that "increased water requirements, if any, will be very limited," without "substantial increase in use levels." AR at 10. The substantive testimony before the hearing examiner indicated that Stanzel intended to provide water for fire flow and additional restrooms for his new game room. A memorandum from City employee Tom Heinecke reveals that the City has "existing, relatively new, 8– and 12–inch City of Puyallup water lines" presently serving the area containing Stanzel's property. AR at 165. Accordingly, Stanzel contends that there is no basis to conclude that he did not comply with the City's requirements. Substantial evidence supports the hearing examiner's decision that Stanzel's proposed changes did not constitute an extension and were not material changes in the size, character, or extent of the necessary city services.

[4] ¶ 24 Stanzel next addresses the process that he did follow. The exhaustion of remedies doctrine applies "in cases where a claim is originally cognizable by an agency which has clearly defined mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought." *Smoke v. City of Seattle*, 132 Wash.2d 214,

224, 937 P.2d 186 (1997). The final action under the PCC for resolution of water service disputes is a decision by the Pierce County hearing examiner. PCC 19D.140.090(F)(2).

¶ 25 Here, the hearing examiner acknowledged that Stanzel did not go through the normal dispute resolution process because of the outcome of one of the hearing examiner's earlier cases, Plexus Investments, in which the hearing examiner stated that properties located outside of the City of Puyallup but within Puyallup's exclusive water service provider area, could go directly to the county hearing examiner to resolve their disputes.

¶ 26 The hearing examiner cited PCC 19D.140.090(F)(2), which provides:

> *847 Unresolved timely and reasonable service disputes shall be referred by the Lead Agency to the Pierce County Hearing Examiner for final resolution of non land use matters pursuant to Pierce County Code subsection 1.22.080 B.2(k).

PCC 19D.140.090(F)(2).[FN4]

> FN4. PCC 19D.140.080 indicates that this dispute resolution authority is for disputes under the Coordinated Water System Plan (CWSP).

¶ 27 PCC 19D.140.090(G) provides:

> **Hearing Examiner Review.** Disputes referred to the Hearing Examiner shall be processed according to the provisions of Pierce County Code Chapter 1.22 as a Non Land Use Matter. Decisions by the Hearing Examiner shall be final and conclusive and must be supported by substantial evidence based on the record and the Timely and Reasonable Service Criteria contained in [Coordinated Water System Plan]—Appendix C.

PCC 19D.140.090(G). Appendix C of the Coordinated Water System Plan (CWSP) provides:

> **H. Pre-annexation Agreements.**
>
> Pursuant to Pierce County Code 19D.140.100, pre-annexation agreements were not contemplated in the designation of exclusive water service area boundaries by the Water Utility Coordinating Committee at the time of service area boundary designation and furthermore, are not necessary to the provision of timely and reasonable service within a purveyor's exclusive water service area boundary. Therefore, a requirement that a potential customer enter into a pre-annexation agreement as a condition of service may be challenged as unreasonable through the dispute resolution process.

CAR at 185. Further, PCC 19D.140.090(A)(1) provides:

> ****540 1. Timely and Reasonable Disputes.** Any existing or potential customer may apply to the Lead Agency to resolve timely and reasonable service disputes the customer has with the designated purveyor as provided for below. A timely and reasonable dispute shall include only existing or potential customers inside an exclusive water service area boundary and the purveyor designated in the Coordinated Water System Plan to provide service to these customers.

PCC 19D.140.090(A)(1). *848 We agree that the PCC provides a forum for Stanzel to dispute the City's failure to provide him with a water availability letter as a reasonable service dispute.

¶ 28 Finally, Stanzel contends that any further exhaustion of remedies with the City would have been futile. He argues that completing an application and paying a high fee with the City would be futile because the City would still require him to agree to annexation as a precondition. Because of our earlier

seeks to vacate was entered. The Court erred in not denying the Motion as untimely.

3. Puyallup's Requested Relief Also is Barred by Judicial Estoppel.

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wash. App. 222, 224-25, 108 P.3d 147 (Div. 1, 2005). Here, Puyallup chose to seek to have all Court Orders vacated, which included an attorney fee award for $132,790.65 awarded against Petitioners. As part of their Motions to Vacate-- it was Puyallup's **firm position** that all judgements **must** be voided. CP 5144. After ***the Trial Court did exactly as Puyallup asked*** and vacated the judgement and orders, Puyallup then turned to seek this same fee award for $132,790.65 -- plus even more-- against Petitioners, ***and this time also*** their legal counsels via a CR 11 Motion. Puyallup's arguments during the CR 11 motion telegraphed their position that the Court should impose the CR 11 award, to make up for Puyallup's loss of the prior fee award:

> I actually regret now having to come back in and undo the $132,000 judgment my client had recorded, was ready to execute on, because we have been penalized for that to their benefit.

CP 5305. Ultimately this Court imposed CR 11 sanctions but only against

one attorney, and at a lower amount that Puyallup sought. CP 5501-5520. Once the Court announced its ruling as to the lower award, only then did Puyallup change its tune again and now seek to "amend"/"reinstate" the original fee award as to the remaining two Petitioners[59].

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). The doctrine seeks "'to preserve respect for judicial proceedings,'" and "'to avoid inconsistency, duplicity, and ... waste of time.'" *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005) (alteration in original) (internal quotation marks omitted) (quoting *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001)).

In *Arkison v. Ethan Allen, Inc.*,[60] the Washington Supreme Court set forth three fundamental factors to guide a court's application of judicial estoppel:

> (1) whether "a party's later position" is "clearly inconsistent with its earlier position";
> (2) whether "judicial acceptance of an inconsistent position in a later

[59] The Court announced its CR 11 ruling and amount on December 11, 2015. CP 5308-5343. December 11,2015 Transcript. Puyallup thereafter filed its (first) motion to "reinstate" the Judgement in January 2016.CP 5063-5075.

[60] *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007) (internal quotation marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

> proceeding would create the perception that either the first or the second court was misled"; and
> (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[61]

These factors are not an "exhaustive formula" and "[a]dditional considerations" may guide a court's decision. *Id.* at 751; *see, e.g., Markley v. Markley*, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948) (listing six factors that may likewise be relevant when applying judicial estoppel). All three criteria are met here: (1) Puyallup has completely reversed its self on the legal position that the judgements "must be null, void and without effect"; (2) By accepting Puyallup's current position, the Court created a perception that the Court was misled in granting the first Order to Vacate, and (3) Puyallup used the vacation of the prior orders to gin up arguments in support of its CR 11 claims, regarding waste of court, city time, etc. Having failed to recoup the larger sanction award it sought in the CR 11 process, Puyallup then reversed gear and attempts and achieved a second bite at the fee apple. Judicial estoppel plainly bars such inconsistency.

> "**Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him,** at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action. . . ."

---

[61] *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir 1999); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)).

> "The rule that a party will not be allowed to maintain inconsistent positions is applied in respect of positions in judicial proceedings. As **thus applied it may be regarded not strictly as a question of estoppel, but as a matter in the nature of a positive rule of procedure based on manifest justice and, to a greater or less degree, on considerations of orderliness, regularity, and expedition in litigation.**

As quoted in, Markley v. Markley, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948). Emphasis added. The rule against inconsistent positions applies generally to positions assumed not only in the course of the same action or proceeding, but also in proceedings supplemental thereto, including proceedings for review or retrial, and even in separate actions or proceedings involving the same parties and questions." 19 Am. Jur. 704, Estoppel, § 72. Judicial estoppel applies to questions of law. In *Hardgrove v. Bowman*, 10 Wn.2d 136, 116 P.2d 336 (1941).

Plexus and Spice put Puyallup on notice of Petitioner Mathew's passing in October 2013, which **was prior to entry** of the December 2013 Judgement. Puyallup could have entered a Judgment and Order only as to Plexus and Spice. It did not. Puyallup could have earlier moved to amend the Judgement and Order to remove Ms. Mathews. It did not. Puyallup instead chose a deliberate strategy first at the Appeals Court and later repeated at Trial Court to move to dismiss the case entirely and make null and void all prior Orders. This deliberate strategy of Puyallup has added years to this lawsuit (Puyallup's unsuccessful Motion to Dismiss at Court

of Appeals was filed February 18, 2014). When one effect of Puyallup's strategy was to eliminate their bloated attorney fee award, and Puyallup's later attempts to achieve it by other means (CR 11) did not replace that fee award, Puyallup abruptly reversed course and sought to "reinstate" an Order it previously argued to vacate. This is judicial estoppel in spades, and the Court erred by granting this schizophrenic legal inconsistency.

VI. CONCLUSION

This Court should (1) grant the appeal, (2) revise and strengthen the 2008 Court Order to find as a matter of law Puyallup breached its duties to provide water service to Petitioners, (3) reverse the Court's 2013 Order dismissing RCW 64.40, Declaratory Judgment and tort claims, (4) remand for trial on damages and attorney fees owed to Petitioners, (5) reverse the CR 11 Order for Sanctions, and (6) reverse the April and May 2016 Orders awarding fees and costs and (7) vacate the 2016 Judgements.

DATED this 21st day of September 2016.

GOODSTEIN LAW GROUP PLLC

By: _____
Carolyn A. Lake, WSBA #13980
Attorneys for Petitioners Spice & Plexus

H

Court of Appeals of Washington,
Division 2.
Michael STANZEL, Respondent,
Pierce County, a political subdivision, Respondent,
v.
CITY OF PUYALLUP, a municipal corporation,
Appellant.

No. 37697-1-II.
June 16, 2009.

Background: Property owner filed a Land Use Petition Act (LUPA) petition, challenging decision of county hearing examiner, determining that examiner lacked authority to compel city to provide continued water service to owner and to provide owner with a water service availability letter. The Superior Court, Pierce County, Thomas P. Larkin, J., granted petition, and city appealed.

Holdings: The Court of Appeals, Bridgewater, P.J., held that:
(1) owner was not required to exhaust remedies with city before filing petition, and
(2) county hearing examiner had authority to require city to provide owner with continued water service.

Affirmed.

West Headnotes

[1] **Water Law 405 ⚿2037**

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)12 Supply to Private Consumers
405k2037 k. Right and duty to supply in general. Most Cited Cases
(Formerly 405k201)

County code provided property owner with a forum to dispute city's refusal to provide him with continued water service and a water service availability letter, and thus owner was not required to exhaust administrative remedies with city before filing Land Use Petition Act (LUPA) petition seeking review of decision of county hearing examiner determining that examiner had no authority to compel city to provide service or issue letter; property was located outside of the city, but within city's exclusive water service provider area, and thus county code allowed owner to go directly to the county hearing examiner to resolve dispute. West's RCWA 36.70C.120.

[2] **Zoning and Planning 414 ⚿1745**

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k1744 Scope and Extent of Review
414k1745 k. In general. Most Cited Cases
(Formerly 414k745.1)

Under Land Use Petition Act (LUPA), an appellate court stands in the shoes of the superior court and limits review to the hearing examiner's record. West's RCWA 36.70C.120.

[3] **Zoning and Planning 414 ⚿1571**

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1571 k. Exhaustion of administrative

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TED SPICE AND PLEXUS DEVELOPMENT, LLC, Appellants, v. PIERCE COUNTY, and CITY OF PUYALLUP, a municipal corporation Respondents.	No. 45476-9-II DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and

1. AMENDED OPENING BRIEF OF APPELLANTS TED SPICE AND PLEXUS DEVELOPMENT, LLC

to be served on September 21, 2016 on the following parties and in the manner indicated below:

David St.Pierre, Deputy Prosecuting Attorney
Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Ste. 301
Tacoma, WA 98402-2160

[X] by United States Mail

Michael C. Walter
Keating Bucklin McCormack Inc PS
800 Fifth Avenue, Ste. 4141
Seattle, WA98104-3175

[X] by United States Mail

ORIGINAL

Kevin Yamamoto
Joe Beck
City of Puyallup Legal Department
333 S Meridian
Puyallup, WA 98371

[X] by United States Mail

Stephen Hansen
Law office of Stephen M. Hansen PS
1821 Dock Street, Unit 103
Tacoma, WA 98402-3201

[X] by United States Mail

Richard B. Kilpatrick, WSBA# 7058
Kilpatrick Group, P.C.
1408 140th Pl. NE, Suite 150
Bellevue, WA 98007

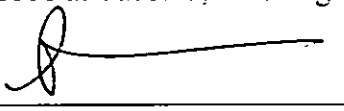
[X] by United States Mail

Tyler Shillito
Smith Alling, P.S.
1501 Dock St.
Tacoma, WA 98402

[X] by United States Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of September 2016 at Tacoma, Washington.



Carolyn A. Lake

McCarthy, 152 Wash.App. 720, 218 P.3d 196 (2009); *Lee ex rel. Office of Grant County Prosecuting Attorney v. Jasman*, 2014 WL 4086304 (2014). Because sanctions under Rule 11, which are intended to address filings not grounded in fact and not warranted by law, or filed for an improper purpose, also have a potential chilling effect, they must be balanced with the purpose behind the rule. *Wood v. Battle Ground School Dist.*, 107 Wash.App. 550, 27 P.3d 1208 (2001).

15. Puyallup Seeks Impermissible Fee Shifting

Rule 11 is not a fee shifting mechanism but, rather, is a deterrent to frivolous pleadings. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wash.App. 409, 157 P.3d 431 (2007). Puyallup's attorneys telegraphed the retinal for seeking CR 11 sanctions:

> I actually regret now having to come back in and undo the $132,000 judgment my client had recorded, was ready to execute on, because we have been penalized...

Excerpt of Puyallup attorney's argument, Transcript of September 25, 2015 hearing, at 58:1-4. CP 5305.

F. THE SUPERIOR COURT ERRED BY ORDER DATED APRIL 15, 2016 "CLARIFYING AND AMENDING" PREVIOUS ORDER VACATING ATTORNEY FEES BY RE-INSTATING ATTORNEY FEES.

Puyallup inaccurately describes its 2016 Motions to Amend as seeking an "***order clarifying***" the Court's July 20, 2101 Vacate Order CP 5130-5142at 5130:16-17. Unquestionably, the Court's July 20, 2015 Order vacated all Orders entered after Ms. Mathews death as "null, void and

without any legal effect", and "vacated ab initio".[53]Puyallup sought to alter that Order to "clarify" that the December 13, 2013 Judgement should now be changed to add back two of the three Petitioners, or alternatively, the Judgment should be "reinstated" as to the two Petitioners. When properly characterized, Puyallup cannot meet the criteria for the actions it now requests. No Court Rule supports a motion to "clarify" an entered Order or to "reinstate" a previously vacated Order. In reality, Puyallup unquestionably asks for the relief of CR 59 **reconsideration** and or a CR 60 **request for relief** from the Court's previous July 20, 2015 Order and Judgement (Vacate Order).Any relief under CR 59 is exceedingly untimely. Relief under CR 60(a) is improper both procedurally and legally, and Puyallup fails to meet its burden to meet the CR 60(a) criteria. Further, Puyallup's Motions are barred by the doctrine of judicial estoppel. The Court erred by granting the Motions.

---

[53] See CP 3209-3421. Order at Finding no. 30, and at 12:2-8, on file with the Court (emphasis added):

... all decisions, orders and judgments of this Court following the death of Doris Mathews on December 8, 2009 are null, void and without any legal effect. **Accordingly, all such decisions, orders and the judgments following Ms. Mathews's (sic) death must be vacated ab initio;**

***

ORDERED, ADJUDGED AND DECREED that all Court actions taken in this case following the death of Doris Mathews on December 8, 2009 - all decisions, orders and judgments -- are VOID AB INITIO. This includes specifically and without limit the Court's June 21 , 2013 Order Granting Summary Judgment (the subject of Petitioners' first appeal) and the December 13, 2013 Final Judgment (the subject of Petitioners' second appeal);

1. **Court Erred: No Basis In Law Supported 2016 Order Award of Fees.**

The Court correctly ruled that the City's CR 60 Motion to amend the Court's July 20, 2015 Order as applied only to Doris Mathews is legally defective and the Court agreed that *Getz*[54] requires that it be denied. April 15, 2016 Order at CP 5540. (Appendix I at page 2). However, the Court erred by eventually granting the Puyallup Motion for Attorney Fees, when the Court ruled that the attorney fee award was based on the order of July 20, 2015. CP 5542. (Appendix I at page 4). The July 15 Order granted Puyallup's October 19, 2014 (second) Summary Judgement CP 2638-2659. The basis of that Motion contains no attorney fee provision which justifies an award.

Puyallup's First Summary Judgment – which was vacated- was based on RCW 64.40, which includes an attorney fee provisions. CP 1652-1696. However significantly, Puyallup's second Summary Judgement motion (Oct 2014) was based on CR 19, Ms. Mathews being an indispensable party. CP 2638-2659. **There is no attorney fee provision for a Motion of this type**. Nowhere anywhere does Puyallup cite to RCW 64.40 in its second (Oct 2014) SJ Motion. In Washington, attorney fees may be

[54] *In re Marriage of Getz*, 57 Wn. App. 602, 604, 789 P.2d 331 (1990), and see *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 680, 279 P.3d 515, 519 (2012), *as amended on denial of reconsideration* (Sept. 25, 2012). *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wash. 2d 320, 326, 917 P.2d 100 (1996). *Krueger Eng'g, Inc. v. Sessums*, 26 Wn. App. 721, 723, 615 P.2d 502 (1980).

awarded when authorized by a private agreement, a statute, or a recognized ground in equity. *D.C.R. Entm't, Inc. v. Pierce Cnty.*, 55 Wash. App. 505, 514, 778 P.2d 1060, 1065 (Div. 2, 1989). Whether a specific statute, contract provision, or recognized ground in equity authorizes an award of fees is a question of law that an appellate court reviews de novo. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 215 P.3d 990, (Wash. Ct. App. 2009). Here the Court erred in awarding the same attorneys fee amount for the second CR 19 Summary Judgement Motion without any basis to do that were previously imposed as a result of Puyallup's first RCW 64.40 Summary Judgment Motion, which did allow attorney fees, but which had been vacated by the Court's July 20, 2015 Order.

An appellate court applies a two-part standard of review to a trial court's award or denial of attorney fees: (1) the appellate court reviews de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) the appellate court reviews a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion. *In re Wash. Builders Benefit Trust*, 173 Wn. App. 34, 293 P.3d 1206, 2013 Wash. App. (Wash. Ct. App. 2013). Here, this Court should find on appeal that there was no legal basis for awarding attorney fees by statute, under

contract, or in equity and that that the Trial Court abused its discretion by the April 15, 2016 Order granting attorney fees, and the fees were per se unreasonable.

2. Puyallup CR 59 Motion is Untimely and Barred.

Although Puyallup fails to cite to CR 59, that rule governs disposition of Puyallup's Motion. CR 59 applies for motions for "New Trial, Reconsideration, And Amendment Of Judgments". [55] CR 59 (9)(b) governs the time for filing Motion for Reconsideration, and CR 59 (9)(h)

---

[55] CR 59 - NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting
the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors:

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005; April 28, 2015.]

governs the time for filing a **Motion To Alter or Amend Judgment.**[56]

Both Rules **unequivocally** require the Motions shall be filed not later than 10 days after the entry of the judgment, order, or other decision.

Puyallup's Motion "to clarify" is clearly time barred[57].

> (h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be **filed not later than 10 days** after entry of the judgment.

CR 59 (9)(h). A motion for reconsideration of a judgment filed after the period specified by former CR 59(b) is **untimely and need not be considered**. *Griffin v. Draper*, 32 Wash.App. 611, 649 P.2d 123 (1982). **Trial court has no discretionary authority to extend the time period** for filing a motion for reconsideration. *Metz v. Sarandos*, 91 Wash.App. 357, 957 P.2d 795 (1998). Here Puyallup's Motion to "clarify" was (first) filed on January 28 2016 and refiled February 16, 2016[58]. CP 5063-5075 and 5130-5142. Clearly it seeks to amend the Court's Vacate Order entered July 20, 2015; this equates to roughly **188 days** after the Order it

---

[56] CR 59 (b) Time for Motion: Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

***

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

[57] **Time for Motion; Contents of Motion.** A motion for a new trial or for reconsideration shall be filed **not later than 10 days after the entry of the judgment, order, or other decision**. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. **A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.**
CR 59 (9)(b).

[58] After Petitioners established they were not timely served with the January pleadings,

analysis, we do not address this issue.

¶ 29 In conclusion, Stanzel was not required to exhaust City remedies first; the PCC does not require a preannexation agreement; and thus, the trial court did not err in denying the City's motion to dismiss.

II. HEARING EXAMINER'S AUTHORITY

[5] ¶ 30 The City next argues that the trial court erred by ruling that the hearing examiner had authority to compel the City to provide water to Stanzel. The City contends that such power far exceeds the statutory authority that the PCC provides its hearing examiners. The trial court considered Stanzel's LUPA petition under RCW 36.70C.130(1)(b), which provides:

> The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:
>
> ...
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.

RCW 36.70C.130(1)(b).

¶ 31 The City contends that the trial court's ruling failed to provide deference to Pierce County's interpretation of its hearing examiner's authority as well as the hearing examiner's own assessment of his authority, which the City claims is limited to (1) adjusting water service boundaries ***849** and (2) imposing reasonable conditions that make a project compatible with its environment, or carry out the goals and policies of the applicable plan. The City begins its argument by discussing the statutory nature of hearing examiners' authority. RCW 36.70.970(1), the City argues, provides hearing examiners only with the power to "hear and decide [only] those issues [the legislative authority] believes should be reviewed and decided by a hearing examiner." RCW 36.70.970(1). The City alleges that the authority to compel a municipality to provide water service or a water availability letter exceeds what RCW 36.70.970(1) permits.

¶ 32 Pierce County's code further defines the authority it provides its hearing examiners. PCC 1.22.080(B) provides its hearing examiners with authority to decide a laundry list of land use and non-land use matters. Section D of the same chapter provides the hearing examiners with

> power to attach *any reasonable conditions found necessary* to make a project compatible with its environment and to carry out the goals and policies of the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or State law, case law or Shorelines Hearing Board decisions.

PCC 1.22.080(D) (emphasis added).

¶ 33 The section of the PCC dealing with Pierce County's Coordinated Water System Plan further clarifies the hearing examiner's authority. PCC 19D.140.090 provides a dispute resolution procedure for disputes involving "interpretation and validity of water service areas and provision of timely and reasonable service." PCC 19D.140.090(A).

> ****541 1. Timely and Reasonable Disputes.** Any existing or potential customer may apply to the Lead Agency to resolve timely and reasonable service disputes the customer has with the designated purveyor as provided for below. A timely and reasonable dispute shall include only existing or potential customers inside an exclusive water service area boundary and the purveyor designated in the Coordinated Water System Plan to provide service

to these customers.

PCC 19D.140.090(A)(1). Further:

***850 H. Boundary Line Adjustment Based Upon Determination of Untimely or Unreasonable Service.** If the Hearing Examiner finds that a purveyor is unable or unwilling to provide timely or reasonable service within its exclusive water service area boundary, the Hearing Examiner shall readjust the purveyor's boundaries to an area which the purveyor will be able and willing to provide service *and/or impose reasonable conditions* pursuant to Pierce County Code subsection 1.22.080C.,[FN5] to ensure timely and reasonable service. The Hearing Examiner's determination on readjustment of a water service area boundary and/or imposition of reasonable conditions shall be supported by substantial evidence in the record.

FN5. Reference to section C was likely error. It appears that that section D is the applicable citation.

PCC 19.D.140.090(H) (emphasis added).

¶ 34 The City contends that because the hearing examiner's only power is to readjust boundaries or impose reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the applicable plan, the hearing examiner lacked any such power to compel it to do anything.

¶ 35 Stanzel counters that appendix C of the CWSP, entered as exhibit 21 before the hearing examiner, provides a nonexclusive list of the elements that the hearing examiner considers when making a timely and reasonable service determination. Appendix C limits issues subject to review as follows:

- Interpretation and application of water utility service area boundaries.
- Proposed schedule for providing service.
- Conditions of service, excluding published rates and fees.
- Annexation provisions imposed as a condition of service, provided existing authorities of City government are not altered by the CWSP, except where a Service area agreement exists between a city and a County, or as are specifically authorized by Chapter 70.116 RCW.

***851** AR at 182. Under the section titled "**TIMELY AND REASONABLE SERVICE DETERMINATION CRITERIA,**" section H addresses pre-annexation agreements as they relate to exclusive water areas. AR at 184–85.

H. Pre-annexation Agreements.

Pursuant to Pierce County Code 19D.140.100, pre-annexation agreements were not contemplated in the designation of exclusive water service area boundaries by the Water Utility Coordinating Committee at the time of service area boundary designation and furthermore, are not necessary to the provision of timely and reasonable service within a purveyor's exclusive water service area boundary. Therefore, a requirement that a potential customer enter into a pre-annexation agreement as a condition of service may be challenged as unreasonable through the dispute resolution process.

CAR at 185.

[6] ¶ 36 The City argues in its reply brief that Stanzel is attempting to supplement the record on appeal. Specifically, it argues that the Standard Service Agreement Establishing Water Utility Service Area Boundaries in the record indicates that the City signed an earlier version in 1994. Appendix C cited here is a part of the 2001 version of the CWSP. Ac-

cordingly, the City contends that Stanzel cannot show that Puyallup was a signatory to the 2001 version of the CWSP. Per RAP 10.3(c), "[a] reply brief should be limited to a response to the issues in the brief to which the reply brief is directed." Further, "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." ****542***Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (citing *In re Marriage of Sacco*, 114 Wash.2d 1, 5, 784 P.2d 1266 (1990)). Because we do not consider issues raised for the first time in a reply brief, we decline to address this issue. *Sacco*, 114 Wash.2d at 5, 784 P.2d 1266.

¶ 37 The City also cites in its reply brief a different section of the 2001 CWSP that allegedly allows water purveyors to require annexation as a condition of service. We decline to review this argument for the same reasons cited above. *Sacco*, 114 Wash.2d at 5, 784 P.2d 1266. At no point during the ***852** hearing before the hearing examiner or before the trial court did the City present this specific argument and, thus, we do not consider it. *Sacco*, 114 Wash.2d at 5, 784 P.2d 1266.

¶ 38 It is clear that the PCC anticipated and allowed water customers and potential water customers to challenge the reasonableness of pre-annexation requirements. The question for this court now becomes whether the hearing examiner has authority to provide the remedy that Stanzel sought here, to require the City to provide his property with continued water service.

¶ 39 As established above, requiring new applicants for water service or service extensions outside of the city limits to agree to a pre-annexation agreement is not per se unlawful. Cases such as *MT* and *Yakima County (West Valley) Fire Protection* reveal that an exclusive provider of sewer service may impose reasonable conditions on its service agreement, including conditions beyond its capacity to provide service. *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 382–83, 858 P.2d 245 (1993); *MT Dev., LLC v. City of Renton*, 140 Wash.App. 422, 428, 165 P.3d 427 (2007).

¶ 40 The distinction that the hearing examiner drew in this case was that Stanzel was already an existing water customer and the City was already providing him with residential water service. The hearing examiner found that Stanzel would not require a significant expansion of water service and any increase in use would be very limited. The hearing examiner noted that the City agreed in 1994 to provide water service to an area including this particular property. The hearing examiner noted that the City had correctly argued that a municipality cannot be compelled to provide water outside its corporate limits, but distinguished this case on the fact that the City was already providing him water. Nevertheless, the hearing examiner agreed with the county and city officials that to compel the City to provide water service as an "imposition of reasonable conditions" under PCC 19D.140.190(H) went too far and that he lacked the power to do so.

***853** ¶ 41 The trial court was correct. As discussed above, the hearing examiner's authority is statutory. Here, the hearing examiner has authority to readjust boundary lines and

> power to attach any reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or State law, case law or Shorelines Hearing Board decisions.

PCC 1.22.080(D); PCC 19D.140.090(H). The record here supports that Stanzel did not have another viable alternative to receiving the City's water. Stanzel investigated other water service providers, including a water utility in nearby Edgewood. Edgewood in-

formed Stanzel that it did not have distribution lines available to Stanzel's property. Stanzel considered buying a fire flow tank but quickly discovered that a 90,000 gallon tank would cost over $80,000. Stanzel's water costs through the City ranged between $30 and $50 per month. Accordingly, we hold that the hearing examiner, in this fact pattern, had authority to place a reasonable condition on the City such that it would not require Stanzel to sign a pre-annexation agreement to use City water because Stanzel was unable to seek service elsewhere, either by private well or secondary water provider.

¶ 42 Affirmed.

We concur: ARMSTRONG and HUNT, JJ.

Wash.App. Div. 2,2009.
Stanzel v. City of Puyallup
150 Wash.App. 835, 209 P.3d 534

END OF DOCUMENT